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IN THE

Supreme Court of the United States

JOHN ARENA AND MICHELLE WENTWORTH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Hobbs Act, 18 U.S.C. § 1951, prohibits as criminal "extortion" the damaging of property as part of a social protest? Whether it was the intention of the Hobbs Act to federally criminalize social protests involving acts of property damage as "extortion" already prosecutable under other criminal statutes?

2. Whether the court below erred in affirming petitioners' criminal convictions under the Hobbs Act?

PARTIES

All of the parties to the proceedings in the courts below are listed in the caption of the case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

APPENDICES v

TABLE OF AUTHORITIES vi

DECISIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

I. THE DECISION OF THE SECOND CIRCUIT CONVERTS ALL UNLAWFUL PROTEST ACTIVITIES INTO FEDERAL CRIMINAL EXTORTION 3

II. THE DECISION OF THE SECOND CIRCUIT DISTORTS THE ELEMENTS OF HOBBS ACT EXTORTION 5

A. No Proof of "Obtaining" 7

1. Plain meaning of "obtaining" 8

2. Meaning of "obtaining" under New York extortion law 9

3. Meaning of "obtaining" at common law: extortion vs. coercion 10

Page

a. extortion at common law 12

b. statutory distinction between extortion and coercion 13

B. No proof of "Property" 16

C. No Proof of "Consent 18

D. No Proof of Force, Violence, or Fear 19

E. No "Wrongful" Purpose 20

F. Disregard of norms of Statutory construction 22

1. Avoiding Constitutional Difficulties 23

2. Federalism 24

3. Rule of Lenity 25

III. WHILE COURTS MUST UNDERSTANDABLY ALLOW WIDE BERTH TO WHAT CONSTITUTES EFFECTIVE REPRESENTATION OF COUNSEL AND THE PROPRIETY OF JUDICIAL RECUSALS, AND MUST RARELY UPSET THE PRIMARY FUNCTION OF TRIAL COURTS AS FACT-FINDERS, IN THIS MOST UNUSUAL CASE, THE COURT SHOULD EXERCISE ITS SUPERVISORY POWERS. 26

CONCLUSION 29

APPENDICES

Page

A. Decision of U.S. Court of Appeals for the Second Circuit (June 7, 1999) 1a

B. Mandate and Order of the U.S. District Court June 7, 1999 ..... 36a

C. 8 U.S.C.A. Section 1951 ..... 38a

D. Memorandum Decision and Order of U.S. District Court for the Northern District of New York (July 25, 1995) 40a

E. Memorandum Decision and Order of U.S. District Court for the Northern District of New York (March 19, 1996) 57a

F. Order (December 22, 1999) (Denying en banc consideration) 95a

G. Mandate and Order of the United States Court of Appeals for the Second Circuit Issued December 29,1999 ..... 97a

H. New York State Penal Law, Section 105.05.C Conspiracy in the fifth degree, Section 145.10 Criminal Mischief in the second degree, New York State Environmental Conservation Law Section 71-2711, Endangering Public Health, safety or the environment in the fourth degree 99a

TABLE OF AUTHORITIES

Page(s)

CASES:

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 22

Cantwell v. Connecticut, 310 U.S. 296 (1940) 23

Carpenter v. United States, 484 U.S. 19 (1987) 17

City of Houston v. Hill, 482 U.S. 451 (1987) 23

Cohen v. California, 403 U.S. 15 (1971) 23

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 23

Evans v. United States 504 U.S. 255 (1992) 9, 10

Gregory v. Ashcroft, 501 U.S. 452 (1991) 24

Jacques Ferber, Inc. v. Bateman, No. 99-CV-2277 (E.D.Pa.), filed May 3, 1999) 4

McCormick v. United States, 500 U.S. 257 (1991) ... 19, 25

McNally v. United States, 483 U.S. 350 (1987) ... 16, 17, 25

Metropolitan RR. Co. v. Moore, 121 U .S. 558 (1887) 9

Morisette v. United States, 342 U.S. 246 (1952) 11

NAACP v. Clairborne Hardware Co., 458 U.S.886 (1982) 23

NAACP v. Button, 371 U.S. 415 (1963) 23

Table of Authorities (continued)

Page(s)

Northeast Women's Center, inc. v. McMonagle, 868 F.2d 1342 (3rd Cir.), *cert. denied*, 493 U.S. 901 (1989) . 14, 19

NOW v. Scheidler, 897 F. Supp. 1047 (N.D. Ill. appeal pending, Nos. 99-3076, 3336, 3891, 3891,3892 (7th Cir.) Consolidated Nov. 18, 1999 4

New York v. United States, 505 U.S. 144, (1992) 24

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1973) 23

People v. Ryan, 232 N.Y. 234, 133 N.E. 572 (1921) 9

People v. Squillante, 18 Misc. 2d 561, 185 N.Y.S. 357, (Sup. Ct. 1959) 9

People v. Whaley 6 Cow, 661 N. Y. (1827) 9

Russello v. United States, 464 U.S. 16, (1983) 8

Salinas v. United States, 522 U. S. 52 (1997) 13

Sedima, v. P.R.L.O. Imrex Co. Inc., 473 U.S. 479 (1985) (Marshall J. in dissent) 4, 8

Strickland v. Washington, 466 U.S. 668 (1984) 28-29

Taylor v. United States, 495 U.S. 575 (1990) (quoted in Evans v. United States, 504 U.S. at 259(1990) 11

Texas v. Johnson, 491 U.S. 397 (1989) 23

Thornhill v. Alabama, 310 U.S. 88 (1940) 23

Table of Authorities (continued)

Page(s)

Town of West Hartford v. Operation Rescue, 915 F. 2d 92 (2d Cir.1990) 19

United States v. Anderson, 716 F. 2d 446 (7th Cir. 1983) . 15

United States v. Bass, 404 U.S. 336 (1971) cited in United States v. Enmons, 410U.S. 396, (1972), 457 F. 2d at 79 20

United States v. Caldes, 457 f. 2d 74, (9th Cir. 1972) (cited with approval in United. States v. Enmons) . . . 20

United States v. Cerelli, 603 F. 2d 415 (3d Cir.1979), *cert. denied*, 444 U.S. 1043 (1980) 14

United States v. Culbert, 435 U.S. 371, (1978) 19

United States v. Delano, 55 F. 3d 720, (2d Cir. 1995) 11

United States v. Enmons, 410 U.S. 396 (1973) . . . 9, 15, 21, 24

United States v. Green, 350 U.S. 415, (1956) 15

United States v. Jackson, 180 F. 3rd 55, 64-65 (2nd Cir. 1999) 20

United States v. Kozminski, 487 U.S. 931 (1988) 25

United States v. Llanes, 374 F. 2d 712, 717 (2d Cir.) *cert. denied*, 388 U.S. 917 (1967) 27

United States v. Nardello, 393 U.S. 286, (1969) 14

United States v. Nedley, 255 F. 2d 350, (3d Cir. (1958) . 10, 15

United States v. Private Sanitation Service Industry Ass'n.,793 F. Supp. 1114 (E. D. N.Y. 1992) 14

Table of Authorities (continued)

Page(s)

United States v. Starks, 515 F. 2d 112 (3d Cir. 1975) 14

United States v. Sweeney, 262 F.2d 272, 275 (3d Cir. 1959) 15

United States v. Turkette, 452 U.S. 576, (1981) 8

STATUTES CITED:

28 U.S.C. Section 1254 2

18 U.S.C. Section 1951 ..... 2, 3, 5, 6, 8, 16

18 U.S.C. Section 1961 (1) (A) 11

18 U.S.C. Section 248 20

OTHER AUTHORITIES CITED:

Am. Jur. 2d Vol. 31A., Extortion, Blackmail, and Threats Actions 49-50 (1989) Id. Section 40, common law meaning 11

Black's Law Dictionary 972 (5th ed. 1979) 8

Blackstone, Commentaries 141 (1769) 12

Blakey & Roddy, Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abbetting and Conspiracy Liability (Under RICO), 33 Am Crim. L. Rev. 1345,1660 n. 25 (1996) (Collecting Statutes) 13

3 E. Coke, First Institute 584 (J. Thomas ed. Ed. 1926 ... 12

Table of Authorities (continued)

Page(s)

FIELD CODE Section 613 (1865) (commentary to Chapter IV Section 584, section 613 (extortion), (larceny) 10

Furrier Files RICO Suit to Halt Anti-Fur Protesters' Excesses," 15 Civil RICO Litigation Rptr. No. 9, p. 3 (May 1999) 4

MODEL PENAL CODE section 212.5 cmt. 2 at 264 (1980) Section 223.4, Id. Section 223.4 cmt. 1 at 201-02, id. Section 223.0(5) another's Id. Section 212.5 smt. 2 at 266, id. Section 223.4 cmt. 1 at 203 13

Oxford English Dictionary, vol. 10, 669-70 (2d Ed.1989) 8

Oxford English Dictionary, vol. 11 at 262 9

Oversight Hearing Addressing the Civil Application of the Racketeering Influenced and Corrupt Organization Act (RICO) to Nonviolent Advocacy Groups, Before the Subcommittee on Crime of the House Comm. On the Judiciary, 105th Cong.,2n Sess.(1998) 4

"Phila. Furrier Files Civil RICO Suit, Claims Protesters Have Gone Too Far," The Legal Intelligenger, p. 1, May 5, 1999) 4

"The Elusive Distinction Between Bribery and Extortion: from the Common Law to the Hobbs Act, 35 UCLA L. Rev. 815 (1988) 12

Table of Authorities (continued)

Page(s)

W. Hawkins, A Treatise of the Pleas of the Crown, 316, (6th ed. 1788) 12

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PETITION FOR WRIT OF CERTIORARI

Petitioners, John Arena and Michelle Wentworth, defendants-appellees in the court below, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit in the case at bar.

DECISIONS BELOW

All decisions in this case to date are entitled *United States v. Arena*. Two of the opinions of the district court are published, at 894 F. Supp. 580 (N.D.N.Y. 1995) (App. D[1]), and at 918 F. Supp. 561 (N.D.N.Y. 1996) (App. E). The decision of the Second Circuit is reported at 180 F.3d 380 (2d Cir. 1999) (App. A).

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[1] "App." refers to the Appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued the decision for which petitioners seek review on June 7, 1999, and denied rehearing and rehearing en banc on December 22, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The text of the Hobbs Act, 18 U.S.C. § 1951, is set forth in Appendix C.

STATEMENT OF THE CASE

Petitioners John Arena and Michelle Wentworth were alleged to have conspired to secure the release of smelly butyric acid, a derivative of rancid butter, inside two abortion facilities, thereby temporarily disrupting use of those facilities.[2] Petitioners, opponents of abortion, acted from a desire to stop the commission of abortions at these facilities.

Petitioners were arrested and charged in state court in New York with criminal mischief, conspiracy, and endangering public safety. Arena plead guilty to all counts, relying on promises that no federal prosecution would ensue. Wentworth was convicted of criminal mischief and conspiracy. Both were sentenced to five years' probation.

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[2] Both incidents occurred prior to the enactment of the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248.

The local District Attorney publicly expressed anger and disappointment with the sentences rendered by the state court system, because the protest related to abortion. He persuaded the local U.S. Attorney to obtain permission from the Department of Justice to bring a federal prosecution. Petitioners were then indicted and convicted for violation of the Hobbs Act, 18 U.S.C. § 1951.

Both the District Court and the Court of Appeals rejected defense contentions that the elements of Hobbs Act extortion were not satisfied in the present case. The appeal to the Circuit Court included also issues of the District Court Judge's failure to recuse because of the District Court Judge's wife's contributions to one of the foci of the protests, one of religious discrimination due to comments made by the District Court judge relating to Mr. Arena's religious affiliation and denial of his request to secure counsel sympathetic to his moral convictions and resultant ineffective performance by said trial level counsel. These the Circuit Court likewise denied.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SECOND CIRCUIT CONVERTS ALL UNLAWFUL PROTEST ACTIVITIES INTO FEDERAL CRIMINAL EXTORTION.

The decision of the Second Circuit in this case, *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), has construed the federal criminal extortion statute, 18 U.S.C. § 1951 (the Hobbs Act), so broadly as to convert that statute into a ban on all unlawful protest activities. Hobbs Act extortion is a predicate act for civil (and criminal) RICO. The decision below

therefore opens the door, not just to federal felony prosecutions of protesters representing causes unpopular with the current Administration (as here), but also to the routine use of civil RICO suits against any and all protest movements. *See Sedima, vs. P.R.L.O. Imrex Co. Inc., 473 U.S. 479, 502, 504, (1985), (Marshall J. in dissent) on "restraining influence of prosecutorial discretion".* Indeed, civil RICO is already being invoked, on precisely a theory of predicate "extortion," against protesters of various political stripes. *See, e.g., Oversight Hearing Addressing the Civil Application of the Racketeering Influenced and Corrupt Organization Act (RICO) to Nonviolent Advocacy Groups, Before the Subcomm. on Crime of the House Comm. on the Judiciary,* 105th Cong., 2nd Sess. (1998) (www.house.gov/judiciary/35055.htm) (testimony of Jeffrey S. Kerr, General Counsel, People for the Ethical Treatment of Animals) (civil RICO suit against anti-vivisection protesters); *Jacques Ferber, Inc. v. Bateman*, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999) (civil RICO suit against anti-fur protesters);[3] *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1998), *appeal pending*, Nos. 99-3076, 3336, 3891, 3892 (7th Cir. consolidated Nov. 18, 1999) (civil RICO suit against pro-life activists).

This Court should grant review to repudiate such broad overreadings of the Hobbs Act and to insist instead upon fidelity to the statutory language, the elements of which preclude such misuse of the Hobbs Act.

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[3] *See* "Furrier Files RICO Suit to Halt Anti-Fur Protesters' Excesses," 15 Civil RICO Litigation Rptr. No. 9, p. 3 (May 1999); "Phila. Furrier Files Civil RICO Suit, Claims Protesters Have Gone Too Far," The Legal Intelligenger, p. 1 (May 5, 1999).

The conduct for which petitioners were prosecuted falls within the range of protest measures which demonstrators have employed since time immemorial. From the dumping of tea shipments at the Boston Tea Party, to the pouring of blood on property used to further military projects, to the sit-ins of the 1960's, 1970's, 1980's, and beyond, demonstrators have employed a mix of First Amendment expression and civil disobedience to further their movements. Such conduct may be punished when it crosses the line into unlawful conduct. Nevertheless, protest activity represents an important outlet for intensely controversial matters. The law therefore has traditionally been temperate in its legal treatment of unlawful protest activities, in sharp contrast with the historic efforts of totalitarian regimes ruthlessly to crush any protest movements challenging the reigning ideology.

The decision of the Second Circuit in the case at bar, in defiance of the established understanding of the role of unlawful protest, has categorically reclassified as felonious "extortion" any protest activities that step over the line into unlawfulness. En route to this conclusion, the court below has twisted the statutory text of the Hobbs Act beyond recognition.

II. THE DECISION OF THE SECOND CIRCUIT DISTORTS THE ELEMENTS OF HOBBS ACT EXTORTION

The Hobbs Act, 18 U.S.C. § 1951, prohibits interference with commerce by "robbery or extortion," § 1951(a), and defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official

right." § 1951(b)(2). A conviction for extortion under the Hobbs Act fails if any one of the essential elements of this statutory offense is lacking.

Defendants were charged with criminal liability for having a co-conspirator dump smelly butyric acid into two abortion businesses. This was vandalism, not extortion. Yet the Second Circuit, negating the legislatively determined limitations of the statute, stretched the Hobbs Act to cover low-level[4] unlawful protest activity. The Second Circuit's reasoning was as follows:

1. "Property" includes "the right to conduct a business free from wrongful force, coercion or fear." 180 F.3d at 392-93.

2. "Obtaining" includes making or attempting to make someone "relinquish" or "abandon" something. *Id.* at 394.

3. "Consent" does not require any action by the victim; it is enough that the defendant try to induce the victim to do or not do something. *Id.* at 395.

4. "Actual or threatened force, violence, or fear" includes release of noxious fumes (as "force and violence") and subsequent fear of a recurrence (as "fear"). *Id.* at 396.

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[4] This is not to deny that the smell of butyric acid is quite unpleasant, but rather to acknowledge that releasing such acid is comparable to stink bombs, excessive noise, crowds of demonstrators, and other sometimes intensely unpleasant, but not uncommon, protest tactics.

5. "Wrongful" was not discussed as an element of Hobbs Act extortion.

With these legal premises in place, the Second Circuit concluded that petitioners "obtained" (sought to induce the victims to abandon, *id.* at 394) "property" (the "business of providing abortions," *id.* at 393), with the victims' "consent" (by inducing them to face the choice whether to continue doing abortions, *id.* at 395) by means of "force" or "violence" (smelly fumes, *id.* at 396) and "fear" (the victims' fear of possible repetition of the act, *id.*).

But *any* protest against a business -- whether logging, sale of furs, tobacco merchandising, scientific research on animals, construction of furniture with wood from rain forests, nonunion harvesting of grapes, manufacture of military weapons, and so forth -- will, under the logic of the decision below, constitute the obtaining (attempt to induce the targets to abandon) of property (the business in question), with consent (by making the targets ponder whether to abandon their business), by means of either fear (worry about future protests) or force or violence (with "force and violence" including things as mild as causing unpleasant smells). In short, *any unlawful protest activity* would, under the Second Circuit's reasoning, constitute Hobbs Act extortion. More than one such illegal act could suffice to trigger a civil RICO suit for a pattern of racketeering activity, with Hobbs Act extortion serving as the predicate acts.

The Second Circuit's opinion clearly opens a Pandora's box.

A.. No Proof of "Obtaining"

It bears special mention that another part of the Hobbs Act -- the "robbery" section -- also uses the term "obtaining":

"robbery" is the "taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury . . .," 18 U.S.C. § 1951(b)(1). Under the Second Circuit's distorted view of "obtaining," a protester who pushes someone to the ground, causing that person's pants to tear or glasses to break, commits "robbery" ("obtaining" the pants or glasses by actual force). The Second Circuit's decision thus spells mischief not only for the law of federal extortion but also for the law of federal robbery. The bumping of opposing demonstrators would become the stuff of civil RICO suits. *See Sedima, 473 U.S. at 503-504 (Marshall, J. in dissent).*

The Second Circuit's gross misreading of the Hobbs Act merits review.

1. Plain meaning of "obtaining"

The court below read the element of "obtaining" to mean "trying to stop." This is not English. Nor is it proper statutory construction. The plain meaning of "obtaining . . . from" includes more than merely making someone "abandon" something.

It is a fundamental rule of interpretation to begin with the text of the statute. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Words are to be given their ordinary meaning. *Russello v. United States*, 464 U.S. 16, 21 (1983). According to the Oxford English Dictionary, vol. 10, 669-70 (2d ed. 1989), the principal sense of "obtain" is "to come into the possession or enjoyment of (something) . . . . to acquire [or] get." *Id. Accord Black's Law Dictionary* 972 (5th ed. 1979) ("obtain" means "[t]o get hold of . . . ; to get possession of; to procure; to acquire in any way"). "Obtaining . . . from" is not

synonymous with "part with," which means "to let go, *give up* [or] surrender." *Oxford English Dictionary*, vol. 11 at 262 (emphasis added).

2. Meaning of "obtaining" under New York extortion law

Under New York law -- the source of the language of the Hobbs Act -- "obtaining" means "gaining," not just "denying." *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973).

The Hobbs Act took its relevant language from the extortion law of the state of New York. *Id.*; *Evans v. United States*, 504 U.S. 255, 261 n.9, 264-65 (1992), *see also Metropolitan RR. Co. v. Moore, 121 U.S. 558, 572 (1887).* Under New York law, it is well-settled that the crime of extortion requires an unlawful taking. *Enmons*, 410 U.S. at 406 n.16 (under New York statute, "extortion requires an intent to *obtain* that which in justice and equity the party is not entitled to *receive*"; accused must be "actuated by the purpose of *obtaining a financial benefit*" such as "receiv[ing] a payoff") (emphasis added; quoting and citing New York cases). *See People v. Whaley*, 6 Cow. 661, 663 (N.Y. 1827) ("[e]xtortion . . . signifies the taking of money" with corrupt intent) (cited in commentary to Field Code of 1865, § 613 (extortion)); *People v. Ryan*, 232 N.Y. 234, 235, 133 N.E. 572, 573 (1921) (blackmail prosecution) (an intent "to extort" requires an accompanying intent to "gain money or property"; mere threat to injure a business is insufficient). *See also People v. Squillante*, 18 Misc. 2d 561, 564, 185 N.Y.S.2d 357, 361 (Sup. Ct. 1959) ("'[o]btaining of property from another' imports not only that he give up something but that the obtainer receive

something"); *United States v. Nedley*, 255 F.2d 350, 355-58 (3d Cir. 1958).[5]

New York law was codified in the Field Code of 1865, which defined extortion as "[t]he *obtaining of property* from another, with his consent, induced by a wrongful use of Force or fear, or under color of official right." FIELD CODE § 613 (1865) (emphasis added). In the commentary to Chapter IV, Section 584 (larceny), the Field Code Commissioners observed:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion, and embezzlement . . . *All four include the criminal acquisition of the property of another* . . . In extortion, there is again a taking . . . Thus extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny.

FIELDCODE, Chapter IV, § 584 co, (emphasis added).
The Field Code, in turn, was one of the sources for the Hobbs Act, *Evans*, 504 U.S. at 261 n.9.

3. Meaning of "obtaining" at common law: extortion vs. coercion

Furthermore, the Second Circuit's theory of "extortion" is completely inconsistent with the distinction at common law --

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[5] In *Nedley*, the Third Circuit squarely held, in accord with New York law, that "obtaining" was synonymous with "taking" and that "robbery" in the Hobbs Act did not extend to "interference by force and violence with . . . lawful dominion and control," since no "taking" or no "intent to steal" could be shown. 255 F.2d at 354-57. The same term "obtaining" is used in the extortion subsection of the Hobbs Act.

incorporated into the Hobbs Act -- between "extortion" and "coercion." "Coercion" is not a predicate act under RICO. 18 U.S.C. § 1961(1)(A). *See, e.g., United States v. Delano*, 55 F.3d 720, 726 (2d Cir. 1995). To read the Hobbs Act to include "coercion" would expand RICO beyond its statutory limits.

"Coercion" is the criminal compulsion of another, by means of threats, to do or not do something. *See* 31A Am. Jur. 2d *Extortion, Blackmail, and Threats* §§ 49-50 (1989) (coercion as independent offense). Coercion is a creature of statute, much broader than extortion. *Id.* Extortion, by contrast, is limited to the *obtaining of property* by means of threat. *Id.* § 40. The "obtaining" element in the Hobbs Act incorporates this distinction.

It is a familiar "maxim that a statutory term is generally presumed to have its common-law meaning." *Taylor v. United States*, 495 U.S. 575, 592 (1990) (quoted in *Evans*,

> "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

504 U.S. at 259-60 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

In *Evans*, the Supreme Court explicitly applied this rule to the terms of the Hobbs Act: "our construction of the statute is

informed by the common-law tradition form which the term of art was drawn and understood." 504 U.S. at 268. This "common-law tradition" demonstrates the flaw in the government's attempt to obliterate the distinction between extortion and coercion.

a. Extortion at common law

Although the common law definition varied from treatise to treatise, extortion unquestionably was a *property* offense. Blacstone[6] described extortion as "an abuse of public justice, which consists in an officer's unlawfully *taking*, by colour of his office, from any man, *any money or thing of value*, that is not due him, or more than is due before it is due." 4 W. Blackstone, *Commentaries* 141 (1769) (emphasis added). In another influential treatise, Coke opined, "[e]xtortion, in its proper sense is a great misprision, by wresting or unlawfully *taking* by any officer, by colour of his office, *any money or valuable thing* . . . either that is not due, or more than is due, or before it be sue . . . ." 3 E. Coke, *First Institute* 584 (J. Thomas ed. 1826) (emphasis added). Hawkins stated,

> [E]xtortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the *taking of money* by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

W. Hawkins, *A Treatise of the Pleas of the Crown* 316 (6th ed. 1788) (emphasis added).

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[6] "The definition of common law extortion that writers on the Hobbs Act frequently cite in Blackstones's . . . ." Lindgren, *The Elusive Distinction Between Bribery and Extortion for the Common Law to the Hobbs Act*, 35 UCLA L.Rev. 815, 862 (1988).

In sum, the common law definition of extortion required the *acquisition of property*. The Hobbs Act, by employing the term "obtaining" from common law, New York law, and the Field Code, incorporated this same element.

b. Statutory distinction between extortion and coercion

The Model Penal Code maintained the distinction between the (originally statutory) crime of coercion and the (originally common-law) crime of extortion. It is appropriate to look to the Model Penal Code to interpret federal law. *Salinas v. United States, 522 U. S. 52, 64-65 (1997) (conspiracy within RICO).* The crime of coercion appears in Section 212.5, which "prohibits specified categories of threats made with the purpose of unlawfully *restricting another's freedom of action* to his detriment." MODEL PENAL CODE § 212.5 cmt. 2 at 264 (1980) (emphasis added). Extortion, by contrast, appears in Section 223.4, which "deals with situations where threat rather than force . . . is the method employed to deprive the victim of his *property*." *Id.* § 223.4 cmt. 1 at 201-02 (emphasis added). As in the Hobbs Act, the Model Penal Code defines extortion to require that one "obtains property of another," *id.* § 223.4, and to "obtain" property means "to bring about a transfer . . . of a legal interest in the property, whether to the obtainer or another," *id.* § 223.0(5) (definitions). The obtaining of property thus distinguishes extortion from coercion, as coercion involves the restriction of another's freedom of action by threat. *Id.* § 212.5 cmt. 2 at 266; *id.* § 223.4 cmt. 1 at 203.

Many states follow the Model Penal Code and distinguish extortion and coercion by categorizing them as separate statutory offenses. Blakey & Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive,*

Accessory, Aiding Abetting and Conspiracy Liability (Under RICO), 33 Am. Crim. L. Rev. 1345, 1660 n.25 (1996) (collecting statutes). A second group of states recognize only the crime of extortion, not coercion. *Id.* at 1660 n.26. Other states combine the two offenses under one single heading. *Id.* at 1660 n.27.

The Second Circuit's theory fails to recognize coercion as a separate offense. Yet "[t]he distinction is not trivial: . . . it is of the essence of extortion -- not only in New York law but, more importantly, in the law generally -- that one compel another to surrender *property*." *United States v. Private Sanitation Industry Ass'n*, 793 F. Supp. 1114, 1132 (E.D.N.Y. 1992) (emphasis in original) (citing *United States v. Nardello*, 393 U.S. 286, 296 (1969)).

Petitioners' acts, like any act of vandalism, may in some sense have "deprived" others of property. But "to deprive" is simply not the same as "to obtain from." Petitioners were not business competitors of the abortion facilities or their employees. They stood to gain nothing by the reduction in the abortionists' business. Even assuming, *arguendo*, that abortion businesses lost "property" because of petitioners, neither the petitioners nor anyone associated with them *obtained* that "property." Whatever else petitioners might have been, they were not "extortionists."[7]

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[7] The Third Circuit holding in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), that no economic benefit or motivation is necessary in pleading and proving a Hobbs Act violation, is clearly wrong. None of the decisions it cited supports its holding. *United States v. Cerelli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), merely held that the extortionist need not obtain the property himself -- a political party may be the recipient of the extorted contributions. *United States v. Starks*, 515 F.2d 112 (3d Cir.

A defendant may "obtain" property for purposes of the Hobbs Act either by *personally* receiving a direct payment from the victim or by obtaining property for *another* person. *United States v. Green*, 350 U.S. 415 (1956). In the case at bar, however, the government proved neither alternative.

The antiwar protester who gets in a shoving match with a counter-demonstrator may be guilty of battery, but he is not guilty of extortion: the protester *obtains no property*. Nor do other incidents of misconduct at protests, or even deliberate civil disobedience, rise to the level of Hobbs Act extortion *unless the perpetrator "obtains" or tries to "obtain" property*. As the Supreme Court observed, the "entire character" of a protest "change[s] from legality to criminality" when the protest is used "to exact the payment of money as a condition of its cessation." *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (editing marks and citation omitted).

1975), held that a religious purpose does not preclude a finding of extortion where money is taken. Finally, *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983), dealt not with the "obtaining from" element of extortion, but with the effect of threats on interstate commerce. The record included evidence that defendant had extorted $300 from the victim. *Id.* at 447. Curiously, the Third Circuit failed to cite its own controlling precedent recognizing that extortion under the Hobbs Act is a "larceny-type offense." *United States v. Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959) (citing *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958)). *McMonagle*, in short, is unpersuasive. The recent use of civil RICO against anti-fur protesters in Philadelphia, *supra* note 1, shows that *McMonagle* has spawned in the Third Circuit exactly the abuse of RICO which the decision below in the present case has unleashed in the Second Circuit.

B. No Proofs of "Property"

Violation of the Hobbs Act requires "the obtaining of *property*," 18 U.S.C. § 1951(b)(2) (emphasis added). The government failed to satisfy this requirement. The only "property" at issue was the property damaged by the petitioners' activities. Petitioners did not "obtain" that property. The Second Circuit relied on a "right to conduct a business free from wrongful force, coercion or fear." 180 F.3d at 393. This abstract "right" of uncertain legal status does not constitute "property" for purposes of the Hobbs Act.

Any unlawful conduct, whether a tort, a breach of contract, or even a parking violation, will interfere to some degree with another person's liberty to do as he pleases. But the Hobbs Act forbids the wrongful obtaining of *property* (extortion), not the wrongful denial of *liberty* (coercion). To treat "rights" as "property" under the Hobbs Act would be to remove all limits whatsoever on the kind of injury necessary to rise to the level of federal criminal extortion.

This Court rejected a similar attempt to expand the concept of "property" beyond all meaning in the context of the federal mail fraud statute. *See McNally v. United States*, 483 U.S. 350 (1987). The mail fraud statute prohibited use of the mails for "obtaining money or property" by fraud. 483 U.S. at 352 n.1. In *McNally*, the government charged the defendant with defrauding Kentucky citizens "of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud . . . ." *Id.* at 354 n.4 (trial court's instruction to jury). This Court recognized an obvious difference between "property rights" and "the intangible right of the citizenry to good government." *Id.* at 356. Indeed, this

distinction was so clear that the Court considered that the only "arguable" way of saving the prosecution would be to construe the mail fraud statute so as to dispense entirely with "the money-or-property requirement" for certain kinds of fraudulent schemes. *Id.* at 358. The Court refused to remove this statutory limitation: "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [the mail fraud statute] as limited in scope to the protection of property rights." *Id.* at 360.

Acceptance of some strained characterization of abstract "rights" as property would likewise leave the boundaries of the Hobbs Act highly ambiguous and would put the federal government in the business of enforcing order in domestic social movements. Did the civil rights activists of the 1960's extort owners of diners of "property" when they obstructed the owners' "right to serve only the customers they chose"? Did these activists extort white bus passengers of their "property" by making these passengers give up their "right to sit in the front of the bus"? Such convoluted abstractions do not constitute "property" under the Hobbs Act.

To be sure, a property right need not be tangible. *Carpenter v. United States*, 484 U.S. 19, 25-27 (1987) (mail fraud statutes apply to wrongful obtaining of intangible property). But "intangible *property*" (such as information, a form of intellectual property) does not equate with "intangible *rights*." A liberty interest such as the "right to conduct a business free from wrongful force, coercion or fear" -- in effect, a "right" to be free from illegal activities -- is, in the words of *Carpenter*, "an interest too ethereal in itself to fall within the protection" of the "property" concept, *id.* at 25.

C. No Proof of "Consent"

The core of extortion is the inducement of voluntary -- but compelled -- action on the part of the victim. The Hobbs Act embodies this concept with its element of "consent" from the victim. The government, however, proved no such extraction of consent.

Vandalism -- even deliberate, serious property damage -- is not the same as extortion. Nor are mere torts -- even intentional torts -- a form of extortion. This is because the consent of the victim is irrelevant to vandalism and intentional torts. The purpose of the vandal or tortfeasor is not to obtain permission for anything, but simply to inflict damage or injury.

The court below viewed the abortion providers' *post hoc* consideration of whether to continue their business as sufficient to satisfy the "consent" element. But all misconduct will prompt some *post hoc* reaction by the victim. To label this "consent" is to empty that term of all meaning.

Any unlawful activity exerts pressure on those who wish to avoid the consequences of that activity. Any property damage "forces" the owner either to replace, repair, or endure the impairment of property. But if the Hobbs Act is not to be construed to outlaw the universe of wrongful conduct, the deliberate seeking of some *consensual* conduct by the victim -- and specifically the consensual surrendering of the property that the extortionist obtains -- must remain a critical element of this statutory offense.

D. No Proof of "Force, Violence, or Fear"

Conduct typical of civil disobedience -- sit-ins, pickets, vehement rhetoric, pouring blood or paint on property or things, damaging weapons components -- does not constitute "force, violence, or fear" under the Hobbs Act. The government has shown no more than conduct of this sort; hence, there can be no predicate extortion. *See Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir. 1990) ("it would be difficult to construe the [anti-abortion rescuers'] activities as described in the complaint, consisting of resistance to police efforts to clear protestors from the [abortion business] . . ., as the 'wrongful use of actual or threatened force, violence or fear' within the meaning of section 1951(b)"). As the sponsor of the Hobbs Act noted, the words "robbery" and "extortion" "have been construed a thousand times by the courts. Everybody knows what they mean." 91 Cong. Rec. 11912 (1945) (quoted in *United States v. Culbert*, 435 U.S. 371, 378 (1978)). The Second Circuit's artificial and unbounded construction of the Hobbs Act, like the prosecutor's attempted expansive reading of that same Act in *McCormick v. United States*, 500 U.S. 257, 272 (1991), is "an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent . . . ."

For forty years after the passage of the Hobbs Act of 1948, not a single reported decision suggested that the pursuit of social, moral, or political goals through pressure tactics -- including lawbreaking in the form of trespass, vandalism, obstruction, mass picketing, and incidental scuffling -- constitutes federal criminal extortion. The isolated and aberrant decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S.

901 (1989), cannot have singlehandedly revolutionized American jurisprudence. *See supra* note 7.

Civil disobedience and social or political pressure tactics are "as American as apple pie," and characterizing ideological movements as extortionate simply because of the use of these traditional methods would move this country precisely in the direction of totalitarian oppression so recently abandoned in the former Soviet Union. The Second Circuit's theory would make an extortionist out of everyone from Mohandas Gandhi, to Martin Luther King, Jr., to the temperance activists of the Nineteenth Century, to the leaders of the Boston Tea Party. Such a construction of the Hobbs Act would distort this statute into a weapon for combating anti-nuclear protesters, animal rights activists, and opponents of apartheid. But as the Ninth Circuit declared in *United States v. Caldes*, 457 F.2d 74 (9th Cir. 1972) (cited with approval in 457 F.2d at 79 (citing *United States v. Bass*, 404 U.S. 336 (1971)), "it appears to us that acts of vandalism of the type committed by these [defendants] would be more properly and suitably prosecuted in the state courts and it is doubtful if Congress intended by Section 1951 to elevate this type of conduct to the level of the federal court." 457 F.2d at 79 (citing *United States v. Bass*, 404 U.S. 336 (1971)).

E. No "Wrongful" Purpose

A Hobbs Act violation requires the "wrongful" use of actual or threatened force, violence, or fear. *United States v. Enmons*, 410 U.S. 396 (1973). The decision below completely disregarded this element; it is not even consistent with the Second Circuit precedent, *see United States v. Jackson, 180 F. 3rd 55, 64-65 (2nd Cir. 1999).* Wrongfulness, however, marks a vital distinction between illegal protest in support of

legitimate goals, on the one hand, and mercenary or corrupt crime, on the other.

In *Enmons*, the defendants engaged in serious acts of property damage: "firing high-powered rifles at three Company transformers, draining the oil from a Company transformer, and blowing up a transformer substation owned by the Company." *Id.* at 398. The alleged perpetrators were striking employees seeking higher wages and benefits. *Id.* The Supreme Court affirmed the dismissal of the indictment for failure to state an offense under the Hobbs Act. *Id.* at 398, 412.

In *Enmons*, the government argued that the "wrongfulness" element was satisfied by the property destruction. The Supreme Court disagreed:

> The term "wrongful," which on the face of the statute modifies the use of each of the enumerated means of obtaining property — actual or threatened force, violence, or fear — would be superfluous if it only served to describe the means used. For it would be redundant to speak of "wrongful violence" or "wrongful force" since, as the Government acknowledges, any violence or force to obtain property is "wrongful."

Id. at 399-400 (footnotes omitted). The wrongfulness must attach to the *objective* of the conduct:

> the literal language of the statute will not bear the Government's semantic argument that the Hobbs Act reaches the use of violence to achieve *legitimate* union *objectives*, such as higher wages in return for genuine services which the employer seeks. In that type of case,

> there has been no "wrongful" taking of the employer's property . . . .

Id. at 400 (emphasis added). "In short, when the *objectives* of the [protest activities] change[] from legitimate . . . ends to personal payoffs, *then* the actions bec[o]me extortionate." *Id.* at 406 n.16 (emphasis added).

In the present case, petitioners' objective was to stop abortion. This is plainly a legitimate objective. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it"). While petitioners' chosen *means* may subject them to criminal prosecution for crimes such as vandalism, the means do not satisfy the "wrongfulness" element of the Hobbs Act. Petitioners' objective was legitimate, even if their means were unlawful. *Bray*, 506 U.S. at 274 ("Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself (apart from the use of unlawful means to achieve it, which is not relevant to our discussion of animus [i.e., purpose]), does not remotely qualify for such harsh description" as "invidious," but rather is "proper and reasonable"). Hence, petitioners' conduct did not violate the Hobbs Act.

F. Disregard of norms of statutory construction

Essentially, the Second Circuit's theory of extortion is that any garden-variety political protest aimed at an industry causes extortion to the extent that it damages property or adversely influences a business. This theory profoundly contradicts several well-established norms of statutory construction.

1. Avoiding constitutional difficulties

It is a fundamental rule of statutory construction that legislation ought not, if a reasonable alternative is present, be interpreted in a manner that raises constitutional difficulties. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This rule of construction mandates fidelity to all of the elements of Hobbs Act extortion -- including the elements missing from defendants' conduct. Were these elements to be read out of the statute, the Hobbs Act would at least arguably expand to cover constitutionally protected activity, such as coercive social protests.

The right to free speech shelters a broad range of expressive activity, including forms of communication which many people might find offensive, coercive, and disruptive. *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (pressuring real estate broker to cease certain practices); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (boycotts enforced through public embarrassment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (attacking religious beliefs). *See also Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *City of Houston v. Hill*, 482 U.S. 451 (1987) (confronting police officer); *Cohen v. California*, 403 U.S. 15 (1971) (profanity). Even when protest activity inflicts economic injury, it does not thereby become unlawful. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

The role of even *civil* litigation to remedy unlawful conduct in the context of social protest activity is therefore sharply limited: "precision of regulation" is essential. *Claiborne Hardware*, 458 U.S. at 916 (citing *NAACP v. Button*,

371 U.S. 415, 438 (1963)). By the same token, broad *criminal* laws pose similar or even greater threats to protected activities. Hence, criminal laws must reflect :precision of regulation."

The Second Circuit's perversely expansive reading of the Hobbs Act clearly makes it a weapon for the *in terrorem* stifling of protest activity.

2. **Federalism**

Second, a court should be loathe to interpret federal statutes in ways that "upset the usual balance of federal and state powers." *New York v. United States*, 505 U.S. 144, 170 (1992). *See generally Gregory v. Ashcroft*, 501 U.S. 452 (1991). "[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *cert. denied*, 423 U.S. 837 (1975).

This Court expressed the same caution in refusing to apply the Hobbs Act to unlawful conduct incident to a labor strike:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

United States v. Enmons, 410 U.S. 396, 411 (1973) (citations omitted). These same principles govern the case at bar.

3. **Rule of lenity**

Third, any "uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (and cases cited). The Second Circuit's expansion of the Hobbs Act stands this rule on its head, as this requires both creating ambiguity by rejecting the clear meaning of statutory terms, and then resolving that contrived ambiguity in favor of an extremely broad interpretation.

"The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60 (citations omitted). This rule serves many important purposes: "to promote fair notice to those subject to criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952.

As a criminal law, the Hobbs Act is subject to this rule of strict construction. *McCormick v. United States*, 500 U.S. at 272-73. This Court must therefore reject the panel's mischievous and highly strained construction of federal criminal "extortion."

III. WHILE COURTS MUST UNDERSTANDABLY ALLOW WIDE BERTH TO WHAT CONSTITUTES EFFECTIVE REPRESENTATION OF COUNSEL AND THE PROPRIETY OF JUDICIAL RECUSALS, AND MUST RARELY UPSET THE PRIMARY FUNCTION OF TRIAL COURTS AS FACT-FINDERS, IN THIS MOST UNUSUAL CASE, THE COURT SHOULD EXERCISE ITS SUPERVISORY POWERS.

This particular case presents a confluence of problems that go to the very heart of the integrity of the judicial system, which, in significant respects, rests upon the confidence of the public.

Double Standard, Recusal and Religious Bias: The Second Circuit applied a double standard regarding the need to document material assertions of fact. On the one hand, the court below accepted mere verbal testimony of Yoffa and Planned Parenthood about the supposed losses (App. A, 14a) to revenue, with no documentation of balance sheets or accountant to testify, and opined that because the acts of defendants "could" affect their ability to purchase supplies, that was sufficient (App. A, 14a). But on the other hand, the Second Circuit dismissed Arena's demand for recusal of the trial court judge, based on the judge's wife's donations to Planned Parenthood, because "Arena submitted no documentation of his financial contribution contention" (App. A at 29a). The trial transcript contains remarks of the judge, who never denied the contributions. He was, however, very concerned about the sources of information (Record of Trial, p. 242), and made references to the Catholic Church. (App., 30a).

Ineffective Counsel: The Second Circuit, in the decision below, rejected Petitioner Arena's claim of ineffective

assistance of counsel. The Court cited *United States v. Llanes,* 374 F. 2d 712, 717 (2d Cir.) (internal quotation marks omitted), *cert. denied,* 388 U.S. 917 (1967), on the principle that ..."the right to counsel cannot be manipulated so as to obstruct the orderly procedure in the courts..." (App. A, 27a). The Court said Arena "...openly acknowledged that he sought to dismiss counsel solely ***in order to manipulate the judicial process..."*** (App. A, at 27a) just "days before trial," (App. A, at 27a,) simply to delay the trial (App. A, 28a), characterizing Arena's attempt as some last ditch effort to seek a delay for delay's sake, on the "eve of trial" as it were, which was to begin December 11.

The actual trial record, however, contains a lengthy 10-page handwritten letter from Arena dated ***November 19, 1995,*** to his attorney emphatically begging his lawyer to "vigorously" seek **immediate** recusal of the trial judge. This letter details at length numerous supporting reasons urging a change of venue as an option to protect Policelli's good relationship with the trial judge in the future. Arena indicated in the letter that he would sever the attorney-client relation if Policelli failed to pursue recusal and change of venue. (Trial Record Appendix Volume I of III, p. 223 to 232., hereinafter referred to as "Tr.") This 10-page missive was mailed by Arena to the trial judge on December 3. He certainly did not "delay" at all, but certainly did much more than a layman could reasonably be expected to do.

Policelli did nothing despite this emphatic condition laid down by his client, until December 6 when the trial court received a notice from Policelli of a motion to recuse presented by Policelli with obvious distaste. (Tr. 218-219).

Therefore, the Second Circuit's characterization of Arena's attempts to seek recusal, change of venue, or,

alternatively, change of attorney as some last ditch effort is not, in fact, supported by the record.

The court below lays blame on Arena, ostensibly for using the discharge of Policelli as a delaying tactic, but it was Arena's ineffective lawyer who delayed, not Arena.

The trial itself lasted only 9 days. Arena's attorney conceded key points relative to Hobbs Act, and, in direct contradiction to his client's desires to pursue the "abortion protest" nature of this case, sought to eradicate references to abortion throughout the record. (Tr. 761. 768, 784).

It was only at the hearing for sentencing, which lasted 5 days, that new defense counsel presented witnesses whose testimony, while addressing the damages, seriously discredited the witnesses presented by the government at trial, which testimony most certainly would have brought a different result. This testimony showed that Yoffa's office (supposedly severely damaged by release of the butyric acid) was operating the very next day, rebutting the testimony of government, raising substantial doubt as to the veracity of the government witnesses, (Tr. 1790). A disinterested "cleanup" worker at both offices testified that the "great cleanup" consisted of basic rug shampooing, with none of the breathing devices that were claimed by the "victims". Much of this and substantial similar testimony should have been part of the trial. (*see* Tr. 1652 to 2303, and *see* Defendant-Appellant's Brief on Appeal to the Second Circuit.). An "effective counsel" would have put this important testimony before a jury, and Arena was grievously harmed by his counsel's failure to investigate, subpoena and put on these necessary witnesses, providing "reasonable doubt" as to the veracity of the government witnesses. Therefore, the standards of *Strickland v. Washington*, 466 U.S. 668, 687-96

(1984), for ineffective counsel, are met. Wherefore, for these reasons Petitioner respectfully requests certiorari be granted to consider whether a new trial should be granted.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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March 21, 2000

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America, Appellee,
v.
John Arena and Michelle Wentworth,
Defendants-Appellants.

Nos. 97-1081(L), 97-1082(C).

June 7, 1999.

MEMORANDUM-DECISION AND ORDER

KEARSE, Circuit Judge:

Defendants John Arena and Michelle Wentworth appeal from judgments entered in the United States District Court for the Northern District of New York after a jury trial convicting each on two counts of extortion and one count of conspiracy to commit extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951 (the "Act"), on account of their attacks on medical facilities that provided reproductive health services. Arena and Wentworth were sentenced principally to 41 and 37 months' imprisonment, respectively, to be followed by three years of supervised release, and were ordered jointly and severally to pay restitution in the amount of $52,062.11. On appeal, they contend principally that the Hobbs Act was not applicable because the government failed to prove (a) that their actions affected interstate commerce and (b) that they thereby obtained property through the wrongful use of violence, force, or fear. For the reasons that

follow, we reject all of their contentions and affirm.

I. BACKGROUND

The present prosecution arises out of two instances in which butyric acid was poured in the premises of upstate New York medical facilities that provided a variety of reproductive health services, including abortions. Butyric acid is a hazardous liquid that emits a powerful, rancid odor. Exposure to its fumes can cause irritation to the eyes and respiratory tract; ingestion of the liquid can cause burns to the gastrointestinal tract; and contact with the liquid can cause severe burns to the skin and eyes. Arena and Wentworth, longtime anti-abortion activists, were tried and convicted in a New York state court on a variety of charges in connection with those incidents. The present federal prosecution followed.

At the trial in the present case, the government's evidence was presented principally through the testimony of victims of the attacks, law enforcement and public health officials, and cooperating witness Michelle Campbell, the person who poured the butyric acid in the medical facilities. Taken in the light most favorable to the government, the evidence at the federal trial revealed the following.

A. The Butyric Acid Attacks

In the early 1990s, Wentworth was the chairperson of the Auburn Right to Life Movement, based in Auburn, New York, and was an active member of the national anti-abortion protest group called Operation Rescue. Arena was a member of Operation Rescue and of the Central New York Right to Life Federation, as well as of another anti-abortion group known as the Lambs of Christ. Campbell was Wentworth's

daughter.

In early 1994, Wentworth informed Campbell that certain of Wentworth's associates in the anti-abortion protest movement were interested in having butyric acid infused in various medical facilities that provided abortions. In March 1994, Wentworth told Campbell that Arena was willing to pay to have the acid poured inside such facilities, at the rate of $100 per facility. After Campbell indicated her interest, Wentworth arranged a meeting with Arena.

1. The Events of April 1994

Arena, Wentworth, and Campbell met on April 13, 1994, at the home of Wentworth and Campbell in Auburn. Arena confirmed that he was willing to pay Campbell to pour butyric acid in targeted clinics, and he proposed that she start with the nearby Planned Parenthood Center of Syracuse ("Planned Parenthood"). After Campbell agreed, Arena provided her with latex gloves, mouthwash that he claimed would eliminate any traces of odor that might be left on Campbell's hands after pouring the acid, and a large bottle of butyric acid. Arena instructed Campbell to pour the acid inside Planned Parenthood during business hours, so that the odor would force the facility to close; Wentworth suggested that the acid be poured into the ventilation system so that the odor would permeate the facility and force it to remain closed for several days.

The three arranged that Campbell, after pouring the acid, would call Wentworth, who would then inform Arena as to Campbell's success; Arena would then send them a check for $100. Wentworth transferred part of the acid from the large bottle brought by Arena into a smaller, 16-ounce bottle and gave the latter to Campbell. Wentworth stored the remaining

acid in her garage.

That night, Campbell went to Syracuse and stayed in a motel. On the morning of April 14, Wentworth paged her at the motel to make sure she still intended to carry out the attack, and Campbell confirmed that she did. Campbell--carrying the butyric acid and other supplies in her handbag--then went to Planned Parenthood and indicated to the receptionist that she wished to purchase condoms. After the receptionist directed Campbell to a location in the clinic where condoms were sold, Campbell entered a restroom, where she opened the bottle Wentworth had given her and poured its contents onto a wall and into a heating duct.

Campbell then set the restroom door to lock automatically upon closing, left the restroom, and exited the building. She discarded her handbag and its contents--including the bottle that had contained the acid--in a trash bin and called Wentworth to report. Wentworth immediately relayed word to Arena that the acid had been poured. Two days later, a check for $100, signed by Arena, arrived at the home of Wentworth and Campbell.

Meanwhile, shortly after Campbell left Planned Parenthood, a foul smell spread throughout the facility. Campbell herself described the smell of butyric acid as "horrible" and "disgusting." (Trial Transcript ("Tr.") 541.) The odor was described by Planned Parenthood employees as "incredibly overpowering" (Tr. 294), "noxious" (Tr. 267), "incapacitating" (Tr. 273), and akin to "vomit" (Tr. 261). Planned Parenthood Executive Director Jeffrey Gilbert immediately suspected butyric acid, as he was aware that other Planned Parenthood affiliates had been the targets of similar attacks and as employees of those affiliates had described the acid's odor to him. Indeed, Gilbert testified

that he had taken certain steps to prepare for a possible butyric acid attack, including locating an environmental cleanup firm. The odor became progressively more intense, and within some 15 minutes the fire department evacuated the facility of the approximately 30 employees and 10 patients then present. The fire department conducted chemical testing and identified the source of the odor as butyric acid.

As a result of the release of butyric acid in its facility, Planned Parenthood was forced to close for the remainder of the day and to initiate a long and costly cleanup effort. The clinic attempted to resume partial operations the next day, but closed again when the continued noxious odor caused Gilbert to fear for the safety of patients and staff. Resumption of partial operations was delayed for several days; the environmental contractor remained on the premises for more than a week, cleaning all exposed surfaces and removing, inter alia, ventilation ducts, flooring, bathroom fixtures, ceiling tiles, draperies, and carpeting, all of which had been contaminated by exposure to the butyric acid and itsfumes. Normal operations at the clinic were not resumed until some 10 days after the attack.

The effects of the acid attack were felt well beyond Planned Parenthood's physical plant. A number of the persons evacuated experienced headaches, nausea, and other physical effects from exposure to fumes. A professional counselor was brought in to meet with clinic personnel, who reported feelings of anger, fear, dread, and vulnerability. Numerous patients informed Planned Parenthood that they were afraid to visit that facility because of the acid attack; they requested possession of their medical records and indicated that they would seek medical services elsewhere. In light of the fears of patients and staff, Planned Parenthood

made several changes to its facilities and security procedures, including hiring a full-time armed guard.

2. The Events of May 1994

Following the butyric acid attack on the Planned Parenthood facility, Wentworth and Campbell discussed plans for similar attacks on the facilities of other upstate New York abortion providers. In May 1994, Campbell agreed to return to the Syracuse area to make such an attack on the private offices of Dr. Jack E. Yoffa, a provider of abortion services who had been the target of numerous anti-abortion protests attended by Arena and Wentworth. Wentworth provided Campbell with a car, a hand-drawn map, and pictures of Yoffa's building, as well as the butyric acid and other supplies needed for the attack.

On May 19, Campbell arrived at Yoffa's offices and asked to use a restroom; she was admitted into a secured area, separated from the reception area by a locked door. She eventually found a restroom but was unable to locate a suitable vent; she therefore poured the butyric acid on the floor.

Campbell left the facility and, after discarding her latex gloves, the empty bottle, and a plastic bag in a nearby wooded area, returned to Auburn. She described the events to Wentworth, who relayed the information to Arena. Arena again sent a check, this time in the amount of $135. The extra $35 was a bonus to Campbell for having poured the acid on the very day that Yoffa was scheduled to receive an award.

The acid attack on Yoffa's offices had effects similar to those experienced by Planned Parenthood. As Campbell

exited Yoffa's offices, staff members began to smell a strong, putrid odor, again likened to "vomit," which rapidly became intense and "overpowering." (Tr. 441.) Several dozen patients and employees had to be evacuated from the facility. Again the impact of the acid attack was extensive. The environmental contractor hired to clean Yoffa's offices worked at the site for approximately one month. Though Yoffa resumed operations, the noxious odor was never completely removed. A number of the persons evacuated experienced headaches, sore throats, nausea, and dizziness, and clinic personnel continued to experience those symptoms, as well as adverse psychological effects, for several weeks thereafter. Numerous patients refused to return to Yoffa's offices and requested that their medical records be transferred to other providers. The attack made staff members fearful for their safety and led one long-time employee to resign.

Yoffa instituted additional security measures. They included installing bullet-proof glass and panic buttons in the reception area, providing personal security devices for clinic staff members to carry as they walked to their cars, and installing a remote starting device in his own car.

B. The Local Investigation and State Court Proceedings

In the weeks following the attack on Yoffa's offices, local law enforcement officials developed a profile and composite sketch of the young woman suspected of pouring the butyric acid at both facilities. Their efforts led them to Campbell, and she was arrested in June 1994. Campbell agreed to cooperate with the police, and she provided a detailed statement describing her agreements with Arena and Wentworth and the manner in which she had carried out the acid attacks at their behest. She also disclosed where she had

discarded the butyric acid bottle she had taken into Yoffa's offices; that bottle was subsequently recovered by the police.

On the day Campbell was arrested, a search warrant was executed for the home she shared with Wentworth. There the police recovered, inter alia, a number of buttons bearing the words "Yoffa kills children" and a photograph of Yoffa's personal residence. A warrant was also obtained for Arena's home, and a search of those premises yielded, inter alia, a handwritten note containing the words "butyric acid."

Arena and Wentworth were arrested, and each was charged in state court with two felony counts of criminal mischief, in violation of N.Y. Penal Law § 145.10 (McKinney 1999); one misdemeanor count of conspiracy, in violation of id. § 105.05(1) (McKinney 1998); and two misdemeanor counts of endangering public safety, in violation of N.Y. Envtl. Conserv. Law § 71- 2711(3) (McKinney Supp.1999). Campbell entered into a plea agreement with local authorities, pursuant to which she pleaded guilty to a state-law charge of felony conspiracy for her role in the two acid attacks and was sentenced to five years' probation; she agreed to testify against Arena and Wentworth.

Arena pleaded guilty to all counts; Wentworth proceeded to trial, at which Campbell testified. The public endangerment charges were withdrawn before the case was submitted to the jury; Wentworth was found guilty on the remaining counts. In February 1995, Arena and Wentworth were sentenced principally to five years' probation.

C. The Federal Prosecution

Shortly after the state-court sentencing, the United States

Attorney for the Northern District of New York, viewing the state proceeding as inadequate to vindicate the federal interest in protecting the rights of citizens to obtain reproductive health services free from threats of force and violence, sought and received permission from the United States Department of Justice to bring the present federal prosecution against Arena and Wentworth. Each was indicted on one count of conspiring to obstruct interstate commerce and two counts of obstructing interstate commerce by committing extortion, in violation of the Hobbs Act, 18 U.S.C. §§ 1951 and 2.

Prior to trial, Wentworth moved for dismissal of the indictment on the grounds, inter alia, that the federal prosecution constituted double jeopardy in violation of her Fifth Amendment rights, see Part II.D.1. below, and that the Hobbs Act was not applicable, as her actions amounted only to "purely local crimes" with no effect on interstate commerce (Affirmation of Carl F. Guy in Support of Motion to Dismiss, dated May 16, 1995, at 1). The motion was denied, and the case proceeded to trial.

The evidence at trial included testimony as to the events described above. In addition, as discussed in greater detail in Part II.A. below, Gilbert and Yoffa testified that their medical facilities served patients from states other than New York and purchased supplies from out-of-state vendors. Defense motions for acquittal were denied, and the jury found Arena and Wentworth guilty on all counts. Defendants were sentenced as indicated above, and these appeals followed.

II. DISCUSSION

On appeal, Wentworth argues principally that the

government's evidence was insufficient to support a conviction under the Hobbs Act; Arena makes a similar argument in contending that he was denied the effective assistance of counsel, see Part II.C.1. below. Defendants also raise other issues, including claims of double jeopardy, challenges to certain instructions and evidentiary rulings, and a contention that the district judge should have recused himself. We conclude that none of their contentions has merit.

A. The Hobbs Act: Effect on Interstate Commerce

The Hobbs Act provides that

> [w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section

shall be fined, or imprisoned, or both. 18 U.S.C. § 1951(a). In a Hobbs Act prosecution, proof that "commerce [wa]s affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." Stirone v. United States, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Defendants contend that the government's evidence was insufficient to show that their conduct had an effect on interstate commerce. We disagree.

Although robbery, violence, extortion, and threats of such conduct are not within the scope of the Hobbs Act absent a nexus with interstate (or foreign) commerce, the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce." Stirone v. United States, 361 U.S. at 215, 80 S.Ct. 270; see also Evans v. United States,

504 U.S. 255, 263 n. 12, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992); United States v. Daley, 564 F.2d 645, 649 (2d Cir.1977), cert. denied, 435 U.S. 933, 98 S.Ct. 1508, 55 L.Ed.2d 530 (1978). Since the Act prohibits the specified conduct if it affects commerce "in any way or degree," 18 U.S.C. § 1951(a), it is well established that the burden of proving such a nexus is "de minimis," United States v. Farrish, 122 F.3d 146, 148 (2d Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 1056, 140 L.Ed.2d 118 (1998). "The jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce.... Even a potential or subtle effect on commerce will suffice." United States v. Angelilli, 660 F.2d 23, 35 (2d Cir.1981), cert. denied, 455 U.S. 945, 102 S.Ct. 1442, 71 L.Ed.2d 657 (1982); see, e.g., Jund v. Town of Hempstead, 941 F.2d 1271, 1285 (2d Cir.1991) ("any interference with or effect upon interstate commerce, whether slight, subtle or even potential ... is sufficient to uphold a prosecution under the Hobbs Act"). Similarly, in a prosecution for Hobbs Act conspiracy, "all that need be shown is the possibility or potential of an effect on interstate commerce, not an actual effect." United States v. Jones, 30 F.3d 276, 285 (2d Cir.) (Hobbs Act jurisdiction may be established by proof of interference "in any manner whatever with interstate commerce, even when the effect of such interference or attempted interference is minimal"), cert. denied, 513 U.S. 1028, 115 S.Ct. 602, 130 L.Ed.2d 513 (1994).

Wentworth's contention that United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), altered these principles is erroneous. In Lopez, the Supreme Court ruled only that the Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A), by which Congress sought to regulate gun possession in the vicinity of schools without regard to whether individual instances of gun possession were

connected in any way to interstate commerce, went beyond Congress's power under the Commerce Clause. See 514 U.S. at 567-68, 115 S.Ct. 1624. We have held that "Lopez did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution," that is, that Lopez "did not alter the long-standing rule that the Government need only demonstrate a de minimis effect upon commerce in order to establish jurisdiction under the [Hobbs] Act." United States v. Farrish, 122 F.3d at 147, 148; see also United States v. Leslie, 103 F.3d 1093, 1100 (2d Cir.) ("Since Lopez, courts interpreting the Hobbs Act ... have continued to hold that Lopez did not affect this de minimis standard."), cert. denied, 520 U.S. 1220, 117 S.Ct. 1713, 137 L.Ed.2d 837 (1997).

Further, the government need not prove that it was the defendants' purpose to affect commerce; it suffices that their conduct had that natural effect. See, e.g., United States v. Daley, 564 F.2d at 649; United States v. Varlack, 225 F.2d 665, 672 (2d Cir.1955). Thus, the

> requisite impact on interstate commerce has ... been found where the resources of a business engaged in interstate commerce are diminished by extortion, thereby permitting the inference that as a consequence of the extortion the operations of the business have been delayed, obstructed or in some way affected.

United States v. Daley, 564 F.2d at 649; see also United States v. Farrish, 122 F.3d at 149 (interstate commerce element proven by evidence that robbed garage, located near interstate portals, "regularly served cars bearing out-of-state license plates," permitting inference that the robberies might discourage out-of-state business); United States v. Jones, 30 F.3d at 285- 86 (interstate commerce affected by robbery of $9,000 from narcotics buyer, depleting his assets and thereby limiting his ability to make future purchases of cocaine, "a commodity that travels in interstate commerce"); United

States v. Calder, 641 F.2d 76, 78 (2d Cir.) (commerce requirement satisfied where victimized restaurant purchased
12a

non-alcoholic wine from Canada), cert. denied, 451 U.S. 912, 101 S.Ct. 1984, 68 L.Ed.2d 302 (1981); United States v. Anderson, 716 F.2d 446, 447, 450 (7th Cir.1983) (interstate commerce requirement satisfied where numerous patients of victim abortion provider came from other states and where provider bought medical supplies from out-of-state companies).

In reviewing a sufficiency challenge, we consider pieces of evidence not in isolation but in conjunction, see, e.g., United States v. Miller, 116 F.3d 641, 676 (2d Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 2063, 141 L.Ed.2d 140 (1998); United States v. Rea, 958 F.2d 1206, 1221 (2d Cir.1992), and we "view the evidence in the light most favorable to the government, drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility," United States v. Allah, 130 F.3d 33, 45 (2d Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 2347, 141 L.Ed.2d 718 (1998); see United States v. Amiel, 95 F.3d 135, 141 (2d Cir.1996); United States v. Rea, 958 F.2d at 1221. These principles apply whether the evidence being reviewed is direct or circumstantial. See Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

The government's evidence in this case was more than sufficient to show the requisite impact on commerce. Gilbert testified that some of Planned Parenthood's patients came from outside of New York, principally from Pennsylvania. He also testified that Planned Parenthood purchased medications and supplies from a number of out-of-state

manufacturers. Most methods of birth control come from out-of-state suppliers. All of our birth control pills, as well as the contraceptive method known as Depo-Provera, which is the contraceptive injection, all of that comes from out of state. We purchase condoms from out of state and a variety of consumable supplies. Our rubber gloves come from out of state. Pregnancy tests are manufactured out of state. (Tr. 290.) Gilbert testified that Planned Parenthood's expenditures for supplies coming from out of state were "probably well over a hundred thousand dollars. Contraceptives alone cost us close to $100,000, and almost all of them are purchased out of state." (Tr. 291-92.) Yoffa similarly testified that he had 40-50 patients from out of state; most were from states contiguous to New York, and some came from as far away as Florida and California. He testified that about 25 percent of all of his supplies came from out of state. The government introduced lists provided by Gilbert and Yoffa of the names and locations of out-of-state vendors from which Planned Parenthood and Yoffa, respectively, purchased supplies.

The government also introduced evidence that numerous patients of both facilities had their appointments cancelled by reason of the butyric acid attacks and that in the wake of the attacks other patients refused to return for medical services. Yoffa testified, for example, that in the three months following the attack on his offices, gross receipts were lower by some $18,000 to $20,000 a month. Further, both facilities would normally have used supplies of out-of-state origin during medical visits by the patients whose appointments were cancelled or who refused to return; the reduced number of patients thus reduced the facilities' need to purchase such supplies. In addition, both facilities incurred substantial expenses as a result of the acid attacks, thereby suffering a diminution of resources that could affect their ability to

purchase such supplies.

The jury, properly instructed in accordance with the above Hobbs Act principles, was entitled to infer from the evidence that some of the patients affected by the acid attacks were residents of states other than New York and that the attacks potentially affected the facilities' purchases of supplies in interstate commerce. We conclude that the government presented sufficient proof of the interstate commerce element.

B. The Hobbs Act: Obtaining Property by Unlawful Means

Wentworth also challenges the applicability of the Hobbs Act to defendants' conduct, focusing principally on the term "extortion," which is defined in the Act as

> the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951(b)(2). Wentworth contends that no Hobbs Act violation was proven, arguing principally that Planned Parenthood and Yoffa did not "consent" to part with "property" as a result of fear because the acid attacks and the facilities' temporary closings were not preceded by any threat; and that defendants did not "obtain[ ]" the facilities' property and were not motivated by the prospect of economic gain. These arguments misperceive the scope of the Act.

1. "Property"

The Hobbs Act, by its terms, encompasses violence against property. See 18 U.S.C. § 1951(a) (commission or threat of physical violence against persons "or property"); United States v. Zappola, 677 F.2d 264, 268 (2d Cir.), cert.

denied, 459 U.S. 866, 103 S.Ct. 145, 74 L.Ed.2d 122 (1982) (noting that common understanding of extortion includes injury to property); 91 Cong. Rec. 11,845 (1945) (Act designed to penalize acts of "violence to personal property"). The concept of "property" under the Hobbs Act is an expansive one. See, e.g., Town of West Hartford v. Operation Rescue, 915 F.2d 92, 101 (2d Cir.1990); United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir.1969), cert. denied, 397 U.S. 1021, 90 S.Ct. 1262, 25 L.Ed.2d 530 (1970). While often the property involved is an existing physical asset, the concept is not limited to tangible things, but includes intangible assets such as rights to solicit customers and to conduct a lawful business. See, e.g., United States v. Margiotta, 688 F.2d 108, 134 (2d Cir.1982) (continuation of insurance business), cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983); United States v. Daley, 564 F.2d at 648 (employees' jobs and contractors' future job assignments); United States v. Tropiano, 418 F.2d at 1075-76 (right to do business in a given area or to bid for contracts); United States v. Anderson, 716 F.2d at 450 (right of doctor to continue to perform abortions).

> The definition of "property" under the Hobbs Act is admittedly expansive.... "[P]roperty" under the Act "includes, in a broad sense, any valuable right considered as a source or element of wealth," including "a right to solicit business." United States v. Tropiano, 418 F.2d [at] 1075- 76 ...; see also Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir.), ("Rights involving the conduct of business are property rights."), cert. denied, [493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210] (1989).

Town of West Hartford v. Operation Rescue, 915 F.2d at 101.

In accordance with these principles, the district court

instructed the jury, without objection, that "the term 'property' as used in these instructions means money or anything of value. The term 'property' is not limited to tangible, physical items and includes the right to conduct a business free from wrongful force, coercion or fear" (Tr. 945-46), and that, as a matter of law, "the business of rendering reproductive health-care services engaged inby Planned Parenthood Center and Dr. Jack Yoffa constitutes 'property' within the definition of Section 1951" (Tr. 946).

Although Wentworth states in her brief on appeal that she does not dispute the propriety of interpreting property as "the right to conduct a lawful business free from threats and violence" (Wentworth brief on appeal at 31 (internal quotation marks omitted)), she appears to focus her arguments instead solely on "physical damage to the facilit[ies] resulting in clean-up and other costs, and lost revenues" (id. at 34). She suggests that, under Town of West Hartford v. Operation Rescue, proof of the latter losses does not suffice to show that she obtained "property" belonging to the attacked facilities.

Wentworth's reliance on Town of West Hartford v. Operation Rescue is misplaced. Although that case, like this one, involved protests against a health care facility that provided abortions (the "clinic" or the "Center"), see 915 F.2d at 94 (defendants sought "to close down the Center and prevent the performance of abortions"), that case was neither a criminal prosecution nor a civil case in which the plaintiff was the facility. Rather, the civil plaintiff was the municipality in which the clinic was located, and the "property" of which the municipality claimed to have been deprived was the municipality's " 'less diligent or softened response' " to the disturbances caused by the protestors, id. at 96 (quoting complaint), " 'the hinderance [sic] of normal

routine police activities within the Town of West Hartford [, and] the cost of increased manpower and equipment needed to respond to the illegal activities,' " id. at 98 (quoting plaintiff's "Response to RICO Case Order"). We ruled that governmental response to unlawful acts is not "property" within the meaning of the Hobbs Act. See id. at 101-02 (neither "altered official conduct," such as the dismissal of criminal charges, nor the expenditure of public funds for police overtime, constitutes property within the meaning of the Act). In light of the breadth of the concept of property, we "[a]ssum[ed] arguendo " that interference with the clinic's operations constituted interference with the property of the clinic, id. at 102, and in ordering the municipality's claims dismissed we noted that we had "not considered the sufficiency of the Center's claims," id. at 105. As quoted above, Town of West Hartford v. Operation Rescue noted that the broad concept of property under the Hobbs Act includes "[r]ights involving the conduct of business." Id. at 101 (internal quotation marks omitted). Accordingly, that case does not justify Wentworth's narrow focus on physical damage to the facilities and the immediate costs associated with clean-up and improved security.

Nor does her narrow focus accurately reflect the framing of the issue submitted to the jury. As indicated above, the court instructed the jury that, for Hobbs Act purposes, property includes the right to conduct a business free from wrongful force, coercion or fear. Further, the trial record makes clear that the jurors had no question as to what that instruction meant, for though they sent the court a note during deliberations asking about the Hobbs Act elements and the definitions of "commerce" and "extortion," they stated, "we are all clear on property." (Tr. 984.)

The evidence presented by the government at trial was

ample to permit the jury to find that defendants' efforts were directed towards interference with the rights of Planned Parenthood and Yoffa's offices to conduct the business of providing abortions. For example, their plan was to have Campbell pour the butyric acid into ventilation systems, in order to have the fumes permeate the facilities and prevent operations for several days. Further, Campbell testified that, according to Wentworth, Arena had $2,000 to spend and was willing to pay $100 apiece for butyric acid attacks on up to 20 clinics "that were performing a lot of abortions at that time" (Tr. 533), focusing in particular on the Syracuse "Planned Parenthood or any abortion clinic around th[e] area" (id.). Gilbert testified that over the years he had observed Wentworth participating in numerous protests against Planned Parenthood (Tr. 336-40), that "Wentworth was part of Operation Rescue" (Tr. 342), and that "Operation Rescue was very open in saying they wanted to shut us down" (id.).

In light of all the evidence, the jury was entitled to infer that Arena and Wentworth intended the butyric acid attacks not as isolated instances of vandalism, but rather as part of an overall strategy to cause abortion providers, particularly Planned Parenthood and Yoffa, to give up their property rights to engage in the business of providing abortion services for fear of future attacks. We conclude that the government's evidence sufficiently showed that defendants attempted and conspired to cause those facilities to give up those rights.

2. "Obtaining"

Still focusing on cost of clean-up and the expense of acquiring improved security, Wentworth also contends that "[t]he property damage sustained by Planned Parenthood

could not have been 'obtained' by Mrs. Wentworth." (Wentworth brief on appeal at 34.) Again, this focus is misplaced for, as just discussed, property may be tangible or intangible, and the property at issue here was the intangible right to conduct business free from threats of violence and physical harm. In light of that intangible right, we see no merit in her argument.

Since the Hobbs Act concept of property is broad, "[t]he Act's requirement that property be 'obtain[ed]' is given a similarly broad construction." Town of West Hartford v. Operation Rescue, 915 F.2d at 101. To commit extortion within the meaning of the Act, the perpetrator of a physical attack or threat need neither seek nor receive an economic benefit. "[L]ack of economic motive does not constitute a defense to Hobbs Act crimes," Northeast Women's Center v. McMonagle, 868 F.2d at 1350, and

> [t]here is no requirement that the perpetrator of an extortion receive the benefit of his act. See, e.g., United States v. Clemente, 640 F.2d 1069, 1079-80 (2d Cir.) ("[W]hether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant for the purpose of determining guilt under that Act."), cert. denied, 454 U.S. 820, 102 S.Ct. 102, 70 L.Ed.2d 91 (1981).

Town of West Hartford v. Operation Rescue, 915 F.2d at 101-02. A perpetrator plainly may "obtain[ ]" property without receiving anything, for obtaining includes "attain[ing] ... disposal of," Webster's Third New International Dictionary 1559 (1976); and "disposal" includes "the regulation of the fate ... of something," id. at 655. Thus, even when an extortionist has not taken possession of the property that the victim has relinquished, she has nonetheless "obtain[ed]" that property if she has used violence to force her victim to abandon it. The fact that the target of a threat or attack may have refused to relinquish his

property does not lessen the extortionist's liability under the Hobbs Act, for the Act, by its terms, also reaches attempts. See 18 U.S.C. § 1951(a); McLaughlin v. Anderson, 962 F.2d 187, 194 (2d Cir.1992).

In sum, where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in order to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act. This interpretation seems implicit in such cases as United States v. Anderson, in which the Seventh Circuit upheld the Hobbs Act convictions of a defendant who had abducted and threatened to kill a doctor and his wife, refusing to release them unless the doctor promised to stop providing abortion services. See 716 F.2d at 447-50; see also Northeast Women's Center v. McMonagle, 868 F.2d at 1350.

In the present case, "obtaining" was established because the evidence was ample to permit the jury to infer that Arena and Wentworth, in perpetrating the butyric acid attacks on the offices of Planned Parenthoodand Yoffa, attempted to induce them to abandon their abortion businesses. The fact that the attacks failed to achieve that abandonment is immaterial.

3. "Consent"

Pointing out that the Hobbs Act definition of coercion speaks of obtaining property from another "with his consent," Wentworth also argues that "it strains intellect to find how any damage to the property involved here, which admittedly occurred without prior threat, fear, etc., could have been obtained by consent...." (Wentworth brief on appeal at 32.)

Again Wentworth ignores the nature of the property at issue. We have little difficulty in concluding that, if Planned Parenthood and Yoffa had abandoned their lawful businesses in fear of further attacks, that abandonment would been achieved by reason of what the Hobbs Act means by "consent."

The legislative history of the Act makes clear that its proponents understood extortion to encompass situations in which a victim is given the option of relinquishing some property immediately or risking unlawful violence resulting in other losses, and he simply chooses what he perceives to be the lesser harm. See, e.g., 91 Cong. Rec. 11,904 (discussing decision of business owner to pay tribute to extortionists rather than risk the physical destruction of his trucks); id. at 11,907 ("The man pays the money to save himself and his property."). In order to foreclose any argument by an extortionist that the relinquishment of property in such circumstances was voluntary, the Hobbs Act definition of extortion simply prohibits the extortionist from forcing the victim to make such a choice.

In this case, the jury was entitled to conclude that Arena and Wentworth sought to force the closure of the attacked health facilities by having Planned Parenthood and Yoffa choose to abandon their rights rather than risk further attacks. The "consent" element was thus satisfied.

4. Use of Actual or Threatened Force, Violence, or Fear

Finally, Wentworth contends that defendants' conduct was not within the scope of the Hobbs Act because no threat was "made [to Planned Parenthood and Yoffa's offices] prior to the actual loss of the property" (Wentworth brief on appeal at 32), that the costs of clean-up thus were not "induced" by

fear (id. at 34), and that any property lost by those facilities hence could not have been extorted from them by "threatened force, violence, or fear," 18 U.S.C. § 1951(b)(2). This argument is meritless.

First, the Hobbs Act prohibits unlawful conduct in the disjunctive. For conduct to come within the scope of the Act it may, for example, include either actual force, or actual violence, or the threat of violence, or the engendering of fear of force or violence. Thus, when actual violence has been used to frighten the victim into giving up a property right, it is irrelevant that that violence was not preceded by a threat. The Act

> does not limit the definition of extortion to those circumstances in which property is obtained through the wrongful use of fear created by implicit or explicit threats, but instead leaves open the cause of the fear.

United States v. Abelis, 146 F.3d 73, 83 (2d Cir.), cert. denied, --- U.S. ----, 119 S.Ct. 527, 142 L.Ed.2d 437 (1998); see also United States v. Covino, 837 F.2d 65, 68 (2d Cir.1988) (a "direct threat of future harm is not necessary to establish the reasonableness of the alleged victim's fear" of future economic loss); United States v. Capo, 817 F.2d 947, 951 (2d Cir.1987) (en banc). A properly instructed jury may properly infer, in appropriate circumstances, that actual violence constitutes a threat of repeated violence, designed to engender fear sufficient to induce the victim to give up its property right.

Second, as discussed in Part II.B.2. above, the Act reaches not only acts of violence that succeed in achieving the ends specified in the statute, but also attempts and conspiracies that are meant, but fail, to achieve those ends.

In the present case, the government's evidence

established that Campbell's pouring of butyric acid into the facilities of Planned Parenthood and Yoffa had an immediate physical impact on those facilities, sufficiently severe to necessitate mass evacuations of patients and clinic personnel. Exposure to the acid's noxious fumes normally may cause irritation to the eyes and respiratory tract; in these instances, the acid attacks caused a number of those persons to experience serious physical symptoms and resulted in significant property damage to both facilities. We have little difficulty in concluding that Campbell's acts constituted an actual use of force and violence within the meaning of the Hobbs Act.

Further, there was ample evidence that the attacks themselves were construed as threats of additional attacks on the facilities, and on persons associated with them, in the event that the facilities failed to give up their abortion practices. Yoffa testified: "Because of what these people did, my family, my wife, myself, our patients, our staff, have lived in fear from that day to this day." (Tr. 448.) Numerous patients refused to return to Planned Parenthood and Yoffa's offices; at least one long-time employee resigned from Yoffa's staff in fear for her personal safety. Planned Parenthood hired a full-time armed guard for its premises; Yoffa purchased personal alarms for his staff and a remote starter for his car, in order to protect against acts of personal violence. Gilbert testified that the attack made him feel "vulnerable," "unsafe," and unable to protect his patients and staff (Tr. 301), and that he viewed the April 14 attack on Planned Parenthood as a threat, i.e., "to say what we will continue to do to you if you don't shut down" (Tr. 344).

On this evidence, the jury easily could have concluded that reasonable persons in the victims' positions would have perceived the butyric acid attacks to be part of a pattern of

violence, intimidation, and threats whose goal was to cause the attacked facilities to cease the business of providing abortion services. The jury was entitled to conclude that Arena and Wentworth, given their long history of protests against Planned Parenthood and Yoffa, knew that the victims would have such a perception, specifically sought to create such a perception, and knowingly endeavored to exploit their victims' fears.

In sum, we conclude that the government established all of the elements of the Hobbs Act violations with which Arena and Wentworth were charged.

C. Arena's Other Contentions

Arena contends principally (1) that he was denied his Sixth Amendment right to counsel (a) because of his trial attorney's choice of defenses, and (b) because the court would not allow him to discharge the attorney prior to trial, and (2) that the trial judge was biased and should have recused himself. We reject Arena's contentions.

1. Ineffective Assistance of Trial Counsel

Arena contends that he received ineffective assistance of counsel because his trial attorney Frank Policelli (1) conceded that Planned Parenthood and Yoffa purchased goods in interstate commerce and that Michelle Campbell had poured the butyric acid in those facilities at Arena's request, and (2) failed to mount defenses focused on the right to protest abortion and on a claim of "necessity" (Arena brief on appeal at 18). His arguments lack merit.

To establish a constitutional claim of ineffective assistance of counsel, a defendant must show (1) that

counsel's performance fell below an objective standard of reasonableness, and (2) that but for the deficiency, the likely outcome of the proceeding would have been different. See, e.g., Strickland v. Washington, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Hooper v. United States, 112 F.3d 83, 87 (2d Cir.1997); United States v. Kirsh, 54 F.3d 1062, 1071 (2d Cir.), cert. denied, 516 U.S. 927, 116 S.Ct. 330, 133 L.Ed.2d 230 (1995). Failure to make a meritless argument does not amount to ineffective assistance. See, e.g., id. Nor does an action or omission that " 'might be considered sound trial strategy'" constitute ineffective assistance. Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. 2052 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)).

Arena has not made the requisite showing. Plainly, in light of our discussion in Part II.A. above of the sufficiency of the government's evidence of a nexus with interstate commerce, any dispute as to that element would not have changed the outcome of the case, and Policelli's election not to dispute that element may be viewed as sound trial strategy.

Nor was it ineffective assistance for counsel to concede that Campbell had committed the acid attacks in collaboration with Arena, for Arena had pleaded guilty in state court to the exact conduct that was at issue in the present case. In the circumstances, it was a reasonable strategy to concede that the events alleged took place and to argue instead that they did not constitute extortion within the meaning of the Hobbs Act.

Finally, Arena has shown no prejudice resulting from Policelli's alleged failure either to present his alleged defense of "necessity"--whose applicability to this case Arena does not explain--or to "present[ ] Mr. Arena's pro-life,

anti-abortion positions as part of the defense" (Arena brief on appeal at 10). The right to hold such views was never an issue; and in the context of this case, counsel may well have chosen not to emphasize those views in order not to add to the evidence of extortionate intent.

2. Arena's Attempt To Discharge Policelli

Nor is there merit in Arena's contention that his Sixth Amendment right was violated because the district court denied a pretrial request by Arena to discharge Policelli. The right to counsel "cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." United States v. Llanes, 374 F.2d 712, 717 (2d Cir.) (internal quotation marks omitted), cert. denied, 388 U.S. 917, 87 S.Ct. 2132, 18 L.Ed.2d 1358 (1967). Judges have an obligation to ensure that requests on the eve of trial for appointment of a new attorney are not allowed to become a vehicle for achieving delay. See, e.g., id.; United States v. Pascarella, 84 F.3d 61, 69 (2d Cir.1996); United States v. McCormick, 993 F.2d 1012, 1013 (2d Cir.1992). The denial of a defendant's request for a continuance will not be reversed absent a showing both of arbitrariness and of prejudice to the defendant. See, e.g., Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); United States v. Weinberg, 852 F.2d 681, 687 (2d Cir.1988). Neither showing is made here.

Arena's request that Policelli be discharged was made on the eve of trial and was openly part of an attempt, just days before trial, to have the district judge recuse himself and to delay the trial. Trial was to begin on December 11, 1995. On December 6, Arena moved for recusal and a continuance

and sent the district judge a letter stating that Arena would fire Policelli if the judge did not recuse himself. In the letter, Arena stated, inter alia, "the last thing I want to do is to fire my attorney, Frank Policelli for whom I have the highest respect" (Letter from Arena to district judge, dated December 3, 1995, at 2); "[t]his letter, frankly, is another attempt to try to convince you to recuse yourself from being the trial judge" (id. at 1); and "[i]f you insist on continuing the trial I intend to fire [Policelli]" (id. at 3). At oral argument just before the commencement of the trial, Arena reiterated this stance. He began, "Let me first say I am totally, totally pleased with my attorney, Frank Policelli." (Tr. 13.) He then informed the court, "[i]f you withdraw from this case this afternoon, I will continue to be represented by Attorney Policelli, if he will accept me as a client, that is" (Tr. 15); and "[i]f you refuse to withdraw from this case, then I will fire Mr. Policelli and from there on will be representing myself" (Tr. 16).

It is clear that Arena sought to delay the trial. His letter stated that if Policelli were discharged, a new attorney would need an adjournment in order to prepare for trial. At oral argument on the day the trial was to begin, Arena stated that if he proceeded pro se, he would need time to prepare and to conduct discovery. He acknowledged, "I am not making any secret of the fact I do want a delay" (Tr. 32).

The district court denied the motion to recuse, see Part II.C.3. below, and, noting Arena's avowed satisfaction with Policelli, denied the motion to discharge Policelli, but it gave Arena the option of either proceeding with Policelli as his attorney of record or proceeding pro se with Policelli as his legal advisor. When Arena sought to have Policelli's fees for continued representation paid from public funds, the court assented. Given this record, in which Arena extolled Policelli's services and openly acknowledged that he sought

to dismiss counsel solely in order to manipulate the judicial process, the district court's refusal to discharge Policelli plainly was neither arbitrary nor unreasonable.

3. Recusal

In motions before and after trial, Arena moved unsuccessfully to have the district judge recuse himself, asserting (1) that the judge (a) had denied Arena bail pending trial in the present case and (b) had ruled adversely to Arena some 10 years earlier in a matter concerning inclusion of a float in the Syracuse St. Patrick's Day parade, and (2) that "[i]t is believed" that the judge's "wife contributed financially to Planned Parenthood" (Affidavit of Frank Policelli dated December 4, 1995, ¶ 2 ("Mr. Arena believes that this sole fact creates a prejudice on the part of your honor because Planned Parenthood is a victim named in this indictment.")). Arena pursues his recusal contention on appeal. We see no basis for reversal.

A judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), and where he knows that he or his spouse "has a financial interest in the subject matter of the controversy or in a party to the proceeding," id. § 455(b)(4). "Specific instances where recusal is required include situations in which the judge has a personal bias or prejudice concerning a party." Diamondstone v. Macaluso, 148 F.3d 113, 120 (2d Cir.1998) (internal quotation marks omitted). Recusal is not required, however, when the alleged interest or bias on the part of the judge or his spouse is "not direct, but is remote, contingent, or speculative." United States v. Morrison, 153 F.3d 34, 48 (2d Cir.1998) (internal quotation marks omitted); see also United States v. Thompson, 76 F.3d 442, 451 (2d Cir.1996). Adverse rulings in other litigation or

the same litigation involving the party seeking recusal generally do not constitute a basis for recusal. See, e.g., Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); United States v. Daley, 564 F.2d at 651. Recusal motions are committed to the sound discretion of the district court, and we review the denial of such a motion only for abuse of discretion. See, e.g., Diamondstone v. Macaluso, 148 F.3d at 120; United States v. Conte, 99 F.3d 60, 65 (2d Cir.1996).

Applying these authorities in the present case, the district judge found no basis on which his impartiality could reasonably be questioned. The fact that the judge had previously made rulings adverse to Arena was not a ground for recusal. The judge rejected the remaining ground, noting that Planned Parenthood, though identified as a victim, was not a party to the action, and that any contribution by his wife to Planned Parenthood did not constitute a financial interest in the organization. Arena submitted no documentation of his financial-contribution contention, nor any other evidence to show that the district court was biased. The judge determined that there was no reasonable basis for questioning his impartiality, and the record before us provides no basis for finding in that conclusion an abuse of discretion.

Finally, we see no merit in Arena's contention, raised for the first time on this appeal, that the district court exhibited religious bias by asking Arena, during argument of his pretrial recusal motion, whether he wanted a Catholic judge. The colloquy was as follows:

> THE COURT: What kind of judge would you want on this case? Would you want a Catholic?
> DEFENDANT ARENA: That's the last one I would want.
> THE COURT: Do you want a Southern Baptist? Would you want an atheist? What kind of judge would you want?

> DEFENDANT ARENA: I want--I want a judge, your Honor, unlike you ... who sympathizes with Planned Parenthood and its abortion industry. I don't care if he is a Catholic or a Jew or anyone else as long as he has no connection with this type of an organization.

(Tr. 28-29.) We do not see in this colloquy any bias on the part of the judge.

D. Wentworth's Other Contentions

Wentworth also raises several additional claims of error, contending principally that she was subjected to double jeopardy and that she was prejudiced by an evidentiary ruling and by one aspect of the court's charge to the jury. She also argues that she is entitled to a new sentencing proceeding because the district court failed to place on the record its reasons for the sentence imposed. We reject all of her contentions.

1. Double Jeopardy

Wentworth's claim that her Fifth Amendment right to be free from double jeopardy was violated by the federal prosecution, following the state prosecution, is meritless in light of the principle of dual sovereignty. Under that principle, a defendant in a criminal case may be prosecuted by more than one sovereign without violating principles of double jeopardy. See, e.g., Heath v. Alabama, 474 U.S. 82, 88-89, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985); United States v. Lanza, 260 U.S. 377, 382, 43 S.Ct. 141, 67 L.Ed. 314 (1922); United States v. Peterson, 100 F.3d 7, 12 (2d Cir.1996). Thus, the federal government may prosecute a defendant following a state prosecution arising out of the same events. See, e.g., Abbate v. United States, 359 U.S. 187, 194-95, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). Although

this principle is inapplicable if one of the sovereigns effectively controlled the other, and the subsequent prosecution was merely a sham, masking a second prosecution by the sovereign that pursued the first prosecution, see, e.g., Bartkus v. Illinois, 359 U.S. 121, 123-24, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); United States v. Peterson, 100 F.3d at 12; United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 494 (2d Cir.1995), the fact that the two sovereigns cooperated in an investigation does not warrant departure from the general principle, see, e.g., United States v. Peterson, 100 F.3d at 12.

A federal prosecutor may, in deciding whether to pursue a subsequent prosecution, take into consideration what he deems an "inadequate result" obtained in the state trial. United States v. Ng, 699 F.2d 63, 68 (2d Cir.1983). The fact that the federal government as a matter of policy does not routinely pursue criminal charges against a defendant who has already been convicted in state court, see, e.g., Petite v. United States, 361 U.S. 529, 530-31, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960) (per curiam), in no way prevents the federal government from doing so whenever it considers that the state proceeding has failed adequately to protect a federal interest, see, e.g., United States v. Davis, 906 F.2d 829, 832 (2d Cir.1990).

Wentworth has presented no evidence that the State of New York was acting at the behest of the federal government in bringing the state charges against her, or that the federal government acted as an agent of the State in prosecuting her for violation of the Hobbs Act. Though she makes conclusory accusations of conspiracy and collusion between the state and federal prosecutors, the record indicates simply that, after Wentworth's state prosecution, the federal government undertook an independent analysis and

concluded that significant federal interests had been left unvindicated by that proceeding. While Wentworth complains that the federal prosecution was motivated by the dissatisfaction of the United States Attorney with the leniency of the sentences imposed against her and Arena by the state court, that factor was plainly a permissible consideration in the assessment of whether the federal interests had been vindicated. We see no violation of Wentworth's right to be free from double jeopardy.

2. Exclusion of Testimony

Wentworth contends that the trial court erred in not allowing her to impeach Campbell by having probation officer Kelly Baumes testify that Campbell had previously stated to Baumes that Wentworth was not involved in the butyric acid incidents. The trial judge's evidentiary rulings are reviewed for abuse of discretion, see, e.g., Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 647 n. 1, 136 L.Ed.2d 574 (1997); United States v. Abel, 469 U.S. 45, 54-55, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984), and we see no abuse of discretion here.

Under Fed.R.Evid. 613(b), extrinsic evidence of a witness's prior statement may be offered to impeach that witness's credibility only if, inter alia, the statement is inconsistent with her trial testimony. See, e.g., United States v. Strother, 49 F.3d 869, 874 (2d Cir.1995). In the present case, Campbell herself testified at trial that she told Baumes her mother had had nothing to do with the incidents and was being unjustly prosecuted. Thus, the proffered Baumes testimony would have been consistent with and duplicative of that portion of Campbell's testimony. The exclusion of the proffered testimony was not an abuse of discretion.

3. The Instruction Describing Wentworth's State Convictions

Wentworth also complains that, in its charge to the jury, the district court misrepresented her state court convictions by stating that she had been found guilty of all of the New York State charges, when in fact she had been "acquitted of the violation of the U.S. Environmental Protection Act" (Wentworth brief on appeal at 44). This argument does not accurately characterize the state-court record.

At the state trial, the jury in fact found Wentworth guilty on all of the counts that were submitted to it. Prior to the submission of the case to the jury, two counts charging violation of state environmental protection law were voluntarily dismissed; there were no charges of violation of federal environmental law. The dismissal of the two state environmental charges did not constitute an adjudication, and the district court properly refused to instruct the jury here as to Wentworth's claimed "acquitt[als]" (id.). The description given to the jury in the present case was substantially correct, and it was immediately followed by an instruction that the jury was to decide the federal charges solely on the basis of the evidence presented at the federal trial. We see no basis for reversal.

4. The Sentencing Record

Finally, we reject Wentworth's contention that there should be a remand for resentencing because her sentencing proceedings were not recorded. Although an equipment malfunction led to an incomplete transcription of those proceedings, the record was thereafter reconstructed in accordance with Fed. R.App. P. 10(c). Wentworth has presented no challenge to the accuracy of the reconstructed record, and that record reveals no error warranting

resentencing.

CONCLUSION

We have considered all of defendants' arguments on these appeals and have found them to be without merit. The judgments of conviction are affirmed.

/s/ Amalya L. Kearse
Amalya L. Kearse
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 7th day of June, one thousand nine hundred and ninety-nine.

BEFORE: Hon. Amalya L. Kearse
Hon. Chester J. Straub
Circuit Judges
Hon. J. Garvan Murtha
Chief District Judge*

Docket Nos. 97-1081, 97-1082

UNITED STATES OF AMERICA,
Appellee,

-v-

JOHN ARENA and MICHELLE WENTWORTH,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgments of said district court be and they hereby are affirmed in accordance with the opinion of this court.

FOR THE COURT
Karen Greve Milton, Acting Clerk
By:
/s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

* The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

ISSUED AS MANDATE: June 28, 1999

APPENDIX C

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 95--RACKETEERING

Current through P.L. 106-73, approved 10-19-1999

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of

official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

United States of America
v.
John Arena and Michelle Wentworth, Defendants.

No. 95-CR-144.

July 25, 1995.

MEMORANDUM-DECISION AND ORDER

MUNSON, Senior District Judge.

Both defendants in this case are charged with two counts of extortion and one count of conspiracy to commit extortion, all in violation of the Hobbs Act, 18 U.S.C. § 1951. The charges stem from two incidents in which defendant Wentworth's daughter, Michelle Campbell, allegedly released butyric acid into facilities in which abortions are performed. The first acid attack took place on April 14, 1994 at Planned Parenthood in Syracuse, New York. The second attack occurred on May 19, 1994 in the Syracuse office of Dr. Jack E. Yoffa. Presently before the court is a motion by defendant Wentworth to dismiss the indictment against her, and a motion by defendant Arena for reconsideration of Magistrate-Judge DiBianco's order detaining Arena pending trial. The court heard oral argument on the motions on July 14, 1995 in Auburn, New York.

BACKGROUND

Defendant John Baptist Arena is an outspoken right-to-life advocate. He has a long criminal history relating to protesting abortion, with charges ranging from trespass to obstructing governmental administration. The government claims that Arena's protest behavior escalated steadily through April, 1994, when he allegedly recruited co-defendant Michelle Wentworth and her daughter, Michelle Campbell, to participate in the butyric acid attacks at issue in this case. According to the government, Arena supplied the acid and financed the criminal enterprise. He induced Wentworth and Campbell to participate by promising $100 for each clinic attacked.

The first target of the conspirators was Planned Parenthood in Syracuse. At noon on April 14, 1994 Michelle Campbell entered Planned Parenthood, gained access to the women's bathroom through a ruse, and discharged butyric acid throughout the bathroom. She poured some of the acid directly into the clinic's ventilation system.

Butyric acid is a colorless substance which emits an odor so noxious as to induce nausea and vomiting, dizziness, and burning of the eyes, throat, and respiratory system of those exposed to the vapors. Employees and patients of Planned Parenthood were overcome by the vapors released during the acid attack, and the clinic was forced to close for the day. A professional cleaning company was hired to clean the facility, and the clinic was not again fully operational until April 19, 1995.

The next target of the conspirators was the office of Dr. Jack Yoffa in East Syracuse. Campbell allegedly released butyric acid in Dr. Yoffa's office on May 19, 1995, using

essentially the same scheme that was successful in her attack on Planned Parenthood. As in the previous attack, Campbell released the acid in the bathroom and left the office undetected.

The two deliberate attacks on medical facilities were costly. Planned Parenthood sustained losses approximating $35,500 relating to cleaning the facility and replacing damaged fixtures. The clinic also lost $5,500 in potential revenues during the time it was closed due to the attack. Planned Parenthood has endured further costs and aggravation due to security measures instituted as a result of the attack. Finally, two employees left their jobs at the clinic because they feared for their safety.

Dr. Yoffa's total financial loss relating to the attack on his offices was $20,430.53. That figure includes $9,295.00 to install bullet-resistant glass between the waiting room and the office suite. One employee quit in the wake of the attack, citing concern for his personal safety. Dr. Yoffa also lost several patients who no longer wish to be treated at his office.

Arena allegedly paid Campbell for the two attacks. He paid $100 for the attack on Planned Parenthood and $135 for the attack on Dr. Yoffa's office. The government alleges that Arena also offered Wentworth and Campbell $1,000 to fire-bomb an abortion clinic.

Michelle Wentworth was arrested on June 3, 1994. She was charged in a June 15, 1994 indictment in Onondaga County Court with criminal mischief, endangering public health, and conspiracy relating to the Planned Parenthood attack. In a separate indictment filed on July 26, 1994 she was charged with criminal mischief and endangering public

health relating to the incident in Dr. Yoffa's offices. Wentworth pleaded not guilty to all charges, but was found guilty after a jury trial. She was sentenced on February 2, 1995 to five years probation and 500 hours of community service.

On April 20, 1995 a federal indictment was returned charging Wentworth and Arena with two counts of extortion and one count of conspiracy to commit extortion. These charges stem from the same events underlying the state charges against defendant Wentworth. On April 21, 1995 both defendants were arraigned before Judge Pooler. Defendant Wentworth was released on bail pending trial. Defendant Arena was detained pending a detention hearing.

The detention hearing took place on April 26, 1995 before Magistrate-Judge DiBianco. On May 2, 1995 the court issued a written decision detaining Arena pending trial because he was a danger to the community.

Presently before the court are motions by both defendants. Defendant Wentworth moves for dismissal of the indictment. Defendant Arena moves to overturn Magistrate-Judge DiBianco's decision to detain Arena pending trial. The court addresses each motion in turn.

DISCUSSION

I. Motion to Dismiss

In her scant submissions to the court in support of her motion to dismiss the indictment against her,[1] defendant

1. The Notice of Motion, Document ("Doc.") 17, is comprised of five terse paragraphs. The Notice is accompanied only by an attorney's affirmation, consisting of eleven one-sentence paragraphs. No

Wentworth raises four arguments. First, she argues that she cannot be convicted in federal court for the same offense that was the basis of her prior state court conviction. Second, she asserts that the Hobbs Act is both unconstitutional and inapplicable to defendant Wentworth's alleged misdeed. Third, she asserts that the grand jury which indicted her was not selected from a representative cross- section of United States citizens, in that women and mothers were excluded from the venire, and that she was improperly prevented from testifying before the grand jury. Fourth, Wentworth argues that the indictment was filed because of a personal grudge.

a. Double Jeopardy

Wentworth's first argument is that she cannot be convicted of a federal crime for the same acts for which she was convicted in state court. This assertion clearly is erroneous. It is well established that the "double jeopardy clause's protection only applies in instances where the same sovereign is responsible for the successive prosecutions." United States v. Giovanelli, 945 F.2d 479, 491 (2d Cir.1991). It further has long been held that the federal government is a separate sovereignty from the individual states. United States v. Lanza, 260 U.S. 377, 378, 43 S.Ct. 141, 141, 67 L.Ed. 314 (1922). Under the principle of dual sovereignty "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." Id., 260 U.S. at 382, 43 S.Ct. at 142. Because the United States has not previously prosecuted defendant Wentworth for the offense charged, her double jeopardy argument is meritless.

b. Applicability of the Hobbs Act--Interstate Commerce

Wentworth next argues that the Hobbs Act is inapplicable to the acts for which she is charged. Her argument is based on her assertion that neither Planned Parenthood nor Dr. Yoffa's office has a nexus to interstate commerce. She cites the United States v. Lopez, --- U.S. ----, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) in support of her contention that the commerce clause was never intended to cover purely local crimes.

> Defendant Wentworth's reliance on Lopez is misplaced. In that case the Supreme Court held that the federal Gun-Free School Zone Act of 1990 ("the Act") exceeds Congress' commerce clause authority and therefore is unconstitutional. The Act made it illegal "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). The Court noted that the Act neither regulated a commercial activity nor required that the possession of a gun be somehow connected to interstate commerce. Lopez, --- U.S. at ----, ----, 115 S.Ct. at 1626, 1634. Because "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," the court ruled that Congress had no power under the Commerce Clause to regulate the activity. Id. at ----, 115 S.Ct. at 1634.

The Hobbs Act is distinguishable from the Gun-Free School Zone Act in that the former expressly requires a connection to commerce. The Hobbs Act applies only to one who "in any way or degree obstructs, delays, or affects commerce" through extortion. 18 U.S.C. § 1951(a). Further, in the instant case, the government pleads an affect on interstate commerce. The damages to Dr. Yoffa's office

affects interstate commerce because he treats out-of-state patients. Additionally, both Planned Parenthood and Dr. Yoffa purchase goods in interstate commerce. Under a "depletion of assets theory," commerce is effected when an enterprise, which either is actively engaged in interstate commerce or regularly purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing its potential as a purchaser of such goods. United States v. Collins, 40 F.3d 95, 101 (5th Cir. 1994); United States v. Morgano, 39 F.3d 1358 (7th Cir.1994). In short, the Hobbs Act is unaffected by the ruling in Lopez, and defendant Wentworth's arguments that the Hobbs Act is unconstitutional or inapplicable to the circumstances of this case are unpersuasive.

c. Validity of the Grand Jury Proceedings

Wentworth's third argument for dismissal is that the grand jury proceedings were insufficient, both because the venire excludes women and mothers from service, and because she was not allowed to testify. A motion to dismiss an indictment based on an objection to the array of grand jurors is governed by Federal Rule of Criminal Procedure 6(b)(2), which incorporates by reference 28 U.S.C. § 1867. That section provides for a motion to dismiss based on a challenge to the array "within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor...." 28 U.S.C. § 1867(a). The moving party must submit "a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title [regulating the selection of grand juries]." 28 U.S.C. § 1867(d). Thereafter the movant may "present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner

or clerk, and any other relevant evidence." Id.

In this case defendant Wentworth's claim is inexplicable given that under the Plan for the U.S. District Court for the Northern District of New York jurors are randomly selected from voter registration and licensed drivers lists, both of which presumably include women and mothers. At oral argument counsel based his argument on surmise and speculation. He presented the court with absolutely no evidence tending to support the allegation that the grand jury venire is unrepresentative, and the motion to dismiss based on that argument is denied.

Defendant Wentworth further argues that she was improperly denied her right to testify before a grand jury. Yet while defendants have a right to testify in a criminal trial, no such right attaches to federal grand jury proceedings. The role of a grand jury is accusatory, rather than adjudicatory. As stated by Justice Scalia:

> It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. That has always been so; and to make the assessment it has always been sufficient to hear only the prosecutor's side.... As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify....

United States v. Williams, 504 U.S. 36, 51-52, 112 S.Ct. 1735, 1744, 118 L.Ed.2d 352 (1992).[2] Because defendant Wentworth had no right to appear before the grand jury, her motion to dismiss is also denied in so far as it is based on this

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2. Of course, nothing prevents a jurisdiction from creating a right to appear before a grand jury. Many states, including New York, have done so. Under New York Criminal Procedure Law § 190.50(5) a defendant

argument.

d. Impermissible Motive

Wentworth's final claim is that the indictment issued because the U.S. Attorney "collud[ed] with a local prosecutor whose nose is out of joint solely because he is dissatisfied with the sentence...." Guy Affirmation, Doc. 15, at ¶ 8. Assuming for the sake of argument that the defendant is correct, the motivation of a prosecuting attorney is irrelevant to the soundness of the indictment. The defendant's charge of an impermissible motive is merely an attempt to impugn the integrity of the indictment through an ad hominem attack. In so far as her motion to dismiss the indictment is based on this argument, the motion is denied.

In sum, defendant Wentworth's motion to dismiss the indictment is denied.

II. Motion to Reconsider

Defendant Arena moves for reconsideration of Magistrate Judge DiBianco's decision to detain him pending trial. Where a defendant seeks review of a magistrate judge's detention order, a district court must fully reconsider the denial of bail. United States v. Eaddy, 853 F.Supp. 592, 593 (N.D.N.Y.1994). That is, the district court "should not simply defer to the judgment of the magistrate, but [must] reach its own independent conclusion." United States v. Leon, 766 F.2d 77, 80 (2d Cir.1985). In performing its de novo review, the district court may either rely on the record before the magistrate judge or, in its discretion, hold a new evidentiary hearing. Id.; United States v. Hall, 651 F.Supp. 13, 14 (N.D.N.Y.1985).

In the instant case, the court finds that it is unnecessary to

hold a new evidentiary hearing. At oral argument, defendant Arena noted that he did not request a rehearing, but seeks only a review based on the record before the Magistrate. The court therefore relies on that record.

Pursuant to 18 U.S.C. § 3142(g) factors to be considered on the issue of detention include: (a) the nature of the offense including whether it is a crime of violence; (b) the weight of evidence against the accused; and (c) the history and characteristics of the accused, including his character, physical condition and mental condition. Pretrial detention is appropriate only where a judicial officer determines that there are no conditions or combinations of conditions which will reasonably assure the appearance of the accused as required and the safety of the community. 18 U.S.C. §§ 3142(e), (f). Here, the government moves for detention based on a theory that defendant Arena is a threat to the community. As the moving party, the government bears the burden of proof. It must demonstrate the ultimate issue of dangerousness by clear and convincing evidence. United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir.1985).

a. Nature of the Offense

Arena argues that the Magistrate erred in classifying the charged offense as a crime of violence. See Order, Doc. 16 at 4-5, 12-14. The defendant's argument in this regard is threefold. First he asserts that the Magistrate failed to consider that the charged actions do not constitute a violation of the Hobbs Act. Second, he argues that the release of butyric acid in the reproductive health care facilities was not an act of violence because he did not intend to injure any person. Third, the defendant states that there is "[a]bsolutely no evidence" to support the "wild accusation" that he offered to pay $1,000 for the firebombing of a medical clinics. Affidavit in Support of Motion, attached to Notice of Motion,

Doc. 25 at ¶ 6(c) (emphasis in original).

The defendant's first argument attacks the sufficiency of the evidence to support the indictment. In effect, Arena argues that the nature of the crime was not violent because his actions did not constitute a crime at all. Such an argument is futile given the well established precedent that a facially valid indictment may not be dismissed for inadequate or incompetent evidence. United States v. Calandra, 414 U.S. 338, 345, 94 S.Ct. 613, 618-19, 38 L.Ed.2d 561 (1974); Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 408-09, 100 L.Ed. 397 (1956). An indictment is facially valid where, as here, it contains the elements of the offense charged and enables the defendant to adequately prepare a defense. De Vonish v. Keane, 19 F.3d 107, 108 (2d Cir.1994). An indictment that "tracks" the language of the statute and states time and place in approximate terms is generally sufficient. Hamling v. United States, 418 U.S. 87, 117 (1974); De Vonish, 19 F.3d at 108-09. Because the indictment in this case meets these conditions, the court need not entertain an argument that no crime has taken place.

Nonetheless, the court has examined the relevant case law concerning the meaning of "extortion" under the Hobbs Act. The Hobbs Act expressly defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Defendant Arena argues that his actions were not legally extortionate because he obtained no property, and because the victims did not consent to any taking. He does not dispute that the alleged crimes were related to interstate commerce.

Courts have interpreted the language the Hobbs Act very

broadly, holding that "property" includes "any valuable right considered as a source or element of wealth," including a right to solicit business, Town of West Hartford v. Operation Rescue, 915 F.2d 92, 101 (2d Cir.1990), cert. denied, 506 U.S. 819, 113 S.Ct. 66, 121 L.Ed.2d 33 (1992), and interpreting "obtaining" such that there "is no requirement that the perpetrator of an extortion receive the benefit of his act." Id.; see United States v. Clemente, 640 F.2d 1069, 1079-80 (2d Cir.) ("[W]hether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant for the purposes ofdetermining guilt under that Act."), cert. denied, 454 U.S. 820, 102 S.Ct. 102, 70 L.Ed.2d 91 (1981); Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir.) (lack of economic motive is not a defense to a Hobbs Act violation), cert. denied, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (5th Cir.1986) ("one need receive no personal benefit to be guilty of extortion; the gravamen of the offense is loss to the victim") (quotations omitted), cert. denied, 480 U.S. 949, 107 S.Ct. 1611, 94 L.Ed.2d 796 (1987). The Hobbs Act has frequently been applied to crimes undertaken for political reasons. See, e.g., Libertad v. Welch, 53 F.3d 428, 438 n. 6 (1st Cir.1995) ("it is difficult to conceive a set of facts that more clearly sets forth extortion" under that Hobbs Act than where abortion protestors physically obstructed entrance to health care facilities, using intimidation and harassment to prevent the clinics from conducting their normal, lawful activities); United States v. Anderson, 716 F.2d 446 (7th Cir.1983) (defendant kidnapped and threatened to kill physician unless he agreed to cease performing abortions). Given the expansive interpretations of Hobbs Act language by the courts, defendant's argument that the facts of this case do not constitute a Hobbs Act violation is misinformed, in addition to being premature.

Arena's second argument concerning the nature of the offense is also unconvincing, as his intent to commit harm to people is not a necessary element in the offense. As Magistrate DiBianco correctly noted, the Hobbs Act punishes the commission or the threat to commit physical violence to any person or property in furtherance of a plan to delay or obstruct interstate commerce. 18 U.S.C. § 1951(a). Arena admitted at the detention hearing that he intended to damage property, thereby forcing two healthcare providers to temporarily cease to operate their lawful businesses. See Transcript, Doc. 31, at 54 (Arena testifies on direct examination that "I admit that ... I conspired to close down a killing center by putting [sic] butyric acid"). His intent to damage property is sufficient for purposes of the Hobbs Act, and is sufficient to constitute violence.

Defendant's third argument concerning the nature of the offense is that there is no evidence supporting the government's claim that he offered $1,000 to his co-defendant, Michelle Wentworth, to firebomb an abortion clinic. Magistrate Judge DiBianco concluded that this allegation was "in itself a strong reason for detention." Order, Doc. 16, at 12. Contrary to the defendant's contention, there is evidence in the record supporting the government's allegation. At the detention hearing the government introduced a statement written and signed by Michelle Campbell, an unindicted co-conspirator of Arena's. In her statement, Campbell stated that Michelle Wentworth told her that John Arena had offered Wentworth $1,000 to perform a firebombing. Government Exhibit ("Exh.") 2, at 12. Although this statement is double hearsay, pursuant to 18 U.S.C. § 3142(f), "rules concerning the admissibility of evidence in criminal trials do not apply to the presentation and consideration of information" at a detention hearing. The court thus may consider Ms. Campbell's statement in

assessing the nature of the crime charged.

Considering the totality of the circumstances, the court determines that defendant John Arena is charged with acts of violence, that defendant Arena's behavior appears to be escalating toward more violent activities, and that his intention in committing the crimes was to terrorize people into foregoing their rights under the law.

b. The Weight of the Evidence

Defendant Arena argues that even if all of the government's allegations are presumed true, it has not established a prima facie case that Arena violated the Hobbs Act. This claim is untenable, for reasons discussed above. Moreover, the evidence against the defendant is extremely strong, as he has confessed under oath to purchasing butyric acid and soliciting and paying for the attacks. Transcript, Doc. 31 at 72 (purchased the acid), 54 (participated in conspiracy), and 77 (paid for attack of Dr. Yoffa's office). Further, FBI Special Agent Patricia Peltier testified at the detention hearing regarding her interview of Michelle Campbell, who accused Arena with supplying her with butyric acid and paying for the attacks. Transcript, Doc. 31, at 17-18; Government Exh. 2, at 12. The government also introduced two checks drawn on Arena's bank account, presumably in payment for the attacks. Government Exhs. 3, 4.

c. Defendant's Personal Characteristics

Defendant Arena is seventy-four years old and has been hospitalized four times since his initial incarceration on federal charges. According to Arena, two of those hospitalizations resulted from chest pains which doctors

concluded were related to stress. Arena was also hospitalized for internal bleeding related to stress.

The government notes that three of the four occasions on which Arena received medical attention followed his February 2, 1995 arrest on charges of aggravated harassment. Those charges are unrelated to the ones currently before the court. They resulted from allegations that Arena sent harassing mailings to Dr. Yoffa and to Salvatore Piemonte, an attorney representing Michelle Campbell. While incarcerated on the harassment charges, the defendant undertook a self-imposed forty day "spiritual fast." He lost thirty-eight pounds as a result of the fast, and three of his hospitalizations occurred during or directly after his hunger strike. Transcript, Doc. 31 at 61-64. Although the court will consider defendant Arena's ill health as a factor in the detention calculus, it must be mindful that much of the damage is self- inflicted.

d. Possible Release Conditions

Defendant Arena's attorney argues that "Arena's lengthy 'taste of jail' has given him more than sufficient incentive to abide by all court imposed conditions should he be released pending trial." Policelli Affidavit in Support of Motion, attached to Doc. 25, at ¶ 12. As the government notes, this claim is belied by Mr. Arena's extensive, seven year history of arrests relating to abortion protest activities. Moreover, Mr. Arena conceded at the detention hearing that he considered the possibility that the acid attacks might put innocent people in fear for their safety. Transcript, Doc. 31 at 74-75. Yet his unrepentant attitude toward his crime is characterized by his statement that "saving a human life is more important than somebody having to come back and go and getting (sic) a birth control pill a week later." Id. at 74.

In short, Mr. Arena believes so fully in the righteousness of his cause that he is willing to sacrifice the legal rights of others to achieve his objective. This court believes that under these circumstances no conditions of release would suffice to ensure the safety of the community.

In particular, the court finds home confinement unsuitable in this case, as the defendant is capable of repeating his crime without leaving home. Nor would releasing defendant Arena into the custody of another member of the community ensure the security of those whose actions, although legal, offend the defendant. In general, the court finds that the actions defendant Arena has taken in furtherance of his cause have become increasingly violent, that there is evidence that his violent tendencies are escalating, and that the weight of evidence that he committed the crimes for which he is charged is compelling. Further, the court finds that defendant Arena's failing health is in part due to his own self-destructive behavior. Based on the totality of the evidence, the court finds that the government has met its burden, and no conditions of release will adequately ensure the safety of the community. This has been shown by clear and convincing evidence. Defendant Arena's motion therefore must be denied.

CONCLUSION

In sum, defendant Wentworth's motion to dismiss the indictment is denied. Defendant Arena's motion for reconsideration of Magistrate Judge DiBianco's order of detention is also denied. Defendant Arena shall continue to be detained pending trial.

It is SO ORDERED.

/s/ Howard Munson
Howard Munson
U.S.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

United States of America
v.
John Arena and Michelle Wentworth, Defendants.

No. 95-CR-144.

March 19, 1996.

MEMORANDUM-DECISION AND ORDER

MUNSON, Senior District Judge.

Before the court are the post-trial motions of two defendants convicted by jury of violating and conspiring to violate the Hobbs Act, 18 U.S.C. § 1951, by causing butyric acid attacks at two medical facilities providing abortion services. The government's theory at trial was that this conduct was extortive within the meaning of the Act, wrongfully inducing the victims to depart with their property (namely their right to conduct business) and was in interference with interstate commerce. Oral argument was heard in Syracuse, New York on January 24, 1996. The following constitutes the Memorandum- Decision and Order of the court.

I. BACKGROUND

The proof at trial and the record to date are sufficient to establish the following facts. On April 14, 1994, Michelle

Campbell, the daughter of defendant Michelle Wentworth, entered the Planned Parenthood Center of Syracuse, New York and released a quantity of butyric acid into the facility. Butyric acid is a noxious and malodorous chemical. Inhalation of its odors can induce nausea, vomiting, dizziness, and a burning sensation in the eyes, throat, and respiratory system. Michelle Campbell executed a similar attack at the offices of Dr. Jack E. Yoffa on May 19, 1994. Both offices provide reproductive services, including abortions. Defendant Wentworth was convicted by jury in state court in Onondaga County for charges relating to this conduct, and defendant Arena pled guilty to related charges.

Defendant Arena paid Michelle Campbell the sum of $100 for the first attack on Planned Parenthood, and $135 for the second attack on Dr. Yoffa's office. He also supplied the butyric acid for each attack. Arena recruited Campbell with the help of her mother, defendant Wentworth. Both Arena and Wentworth are antiabortion advocates with prior arrests arising from their protest activities.

The attacks caused significant losses at the two facilities. Both were forced to evacuate and close. Seven people from Dr. Yoffa's office required emergency treatment at hospitals for exposure to acidic vapors. Former patients were intimidated away, revenues were lost during the closings, substantial cleanup costs were incurred, new and costly security measures have been necessitated, and employees quit out of fear. Dr. Yoffa suffered losses in excess of $20,000 and Planned Parenthood in excess of $35,000.

On December 22, 1995, after an eight day trial, the jury returned their verdict. Both defendants were found guilty of two counts of extortion and one count of conspiracy to commit extortion in violation of the Hobbs Act. The

post-trial motions of the defendants are addressed below.

II. DISCUSSION

The court discerns three arguments in the memoranda of the defendants. First, they contend the Hobbs Act is inapplicable to the facts of the case and the evidence at trial could not as a matter of law support the convictions. Wentworth Memorandum ("Mem.") of Law, Document ("Doc.") 74, at 7-14; Transcript of Motions, Exhibit ("Exh.") A attached to Wentworth Mem. of Law, Doc. 74.[1] Second, defendant Arena asserts that the incompetence of the counsel for the codefendant during trial prejudiced him to the extent that a new trial is required. Arena Notice of Motion, Doc. 72, at 2-3. And third, defendant Wentworth claims that the federal prosecution following her state conviction for the same conduct violated her constitutional rights. Wentworth Mem. of Law, Doc. 74, at 12. In addition to these points, briefed and argued by counsel, Mr. Arena in a statement to the court raised numerous complaints which the court will address at the end of this opinion.

After a general review of the standards for granting judgment of acquittal in a criminal case, or for a new trial, the particulars of each defendant's arguments will be examined.

A. Standards

1. Defendant Arena in his Notice of Motion, Doc. 72, renews the Fed.R.Crim.P. 29(a) motions he made following the close of the government's case without reducing the substance of those motions to the text of his post-trial filings. A transcript of the Rule 29(a) motions of both defendants can be found appended to defendant Wentworth's Memorandum of Law, Doc. 74, as Exhibit A. The court reserved

It matters not whether a motion for judgment of acquittal is made before the jury's verdict or after; the available grounds and standard for granting or denying are the same. See United States v. Burns, 597 F.2d 939, 941 (5th Cir.1979). The motion should be granted "if the evidence is insufficient to sustain a conviction" Fed.R.Crim.P. 29(a), or possibly if there is a "hopeless variance" between the proof and the crime charged, 2 Charles A. Wright, Federal Practice and Procedure: Criminal 2d § 466, at 654 (1982 & Supp.1995). The trial judge in considering a motion under Rule 29

must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

Curley v. United States, 81 U.S.App.D.C. 389, 160 F.2d 229, 232-33, cert. denied, 331 U.S. 837, 67 S.Ct. 1512, 91 L.Ed. 1850 (1947); accord United States v. Rodriguez, 706 F.2d 31, 41 (2d Cir.1983); United States v. Lieberman, 637 F.2d 95, 104-05 (2d Cir.1980); United States v. Taylor, 464 F.2d 240, 243 (2d Cir.1972); United States v. Moustakis, 864 F.Supp. 390, 391-92 (S.D.N.Y.1994).

The evidence should be evaluated in a light most favorable to the government, United States v. Cunningham, 723 F.2d 217, 230 (2d Cir.1983), cert. denied, 466 U.S. 951,

104 S.Ct. 2154, 80 L.Ed.2d 540 (1984), and the defendant's burden is very heavy, United States v. Chang An-Lo, 851 F.2d 547, 553 (2d Cir.) (citations omitted), cert. denied, 488 U.S. 966, 109 S.Ct. 493, 102 L.Ed.2d 530 (1988). A reserved decision on a motion for acquittal made during trial must be decided "on the basis of the evidence at the time the ruling was reserved." Fed.R.Crim.P. 29(b). That limitation is of no consequence in the matter sub judice as the reserved Rule 29(a) motions concern issues which would not be affected by the defense's case.

"Although a trial court has broader discretion to grant a new trial pursuant to Rule 33 than to grant a motion for judgment of acquittal pursuant to Fed.R.Crim.P. 29 ..., that discretion should be exercised sparingly." United States v. Sanchez, 969 F.2d 1409 (2d Cir.1992), cert. denied, --- U.S. ----, 115 S.Ct. 1404, 131 L.Ed.2d 291 (1995). A district judge may order a new trial "if required in the interest of justice." Fed.R.Crim.P. 33. New trials may be granted on several grounds, including inter alia newly discovered evidence, juror bias, prosecutorial misconduct, ineffective assistance of counsel, witness perjury, or simply that the verdict was against the great weight of the evidence. See generally 8A James Wm. Moore, Moore's Federal Practice ¶ 33.02[1] n. 2, 33.04-.06 (2d ed. 1995). However, the court is usually directed to defer to the jury's resolution of the weight of the evidence and witness credibility. Sanchez, 969 F.2d at 1414 (quoting United States v. LeRoy, 687 F.2d 610, 616 (2d Cir.1982), cert. denied, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983)).

With these benchmarks in mind, the court proceeds to the argument over the applicability of the Hobbs Act to the facts of this case.

B. The Hobbs Act

Both defendants argue that the government in this case failed to prove beyond a reasonable doubt all the elements of extortion under the Hobbs Act, which reads in pertinent part

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years or both. 18 U.S.C. § 1951(a).

"Extortion" in turn

> means the unlawful taking or obtaining of personal property from another, with his consent, induced by wrongful use of actual or threatened force, or fear, or under color of official right.

Id. § 1951(b)(2).

By its own terms, the Hobbs Act is also violated when a defendant attempts to extort in interference with interstate commerce. E.g., United States v. Rindone, 631 F.2d 491, 493 (7th Cir.1980) (per curiam).

Between their two motions, defendants challenge the applicability of every element of the crime. For this reason, the separate elements of Hobbs Act extortion are analyzed in the order they appear in the statute, with individual arguments of the defendants interwoven. Additionally, defendant Wentworth makes an unparticularized argument that the Hobbs Act was not intended by Congress to apply to the circumstances of this case and is an unwarranted extension of federal jurisdiction into the domain of the states.

This 'federalism' contention is also discussed.

1. Interstate Commerce

Beginning with the required nexus with commerce, defendant Wentworth relies upon United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) for the proposition that the charged extortive conduct must 'substantially' affect interstate commerce. Wentworth Mem. of Law, Doc. 74, at 6. In the much discussed Lopez case the Supreme Court struck down the Gun- Free School Zones Act as an unconstitutional exercise of Congress' power to regulate interstate commerce. 514 U.S. at ----, 115 S.Ct. at 1626. Prior to Lopez, all the circuits that considered the issue held that only a de minimis effect upon commerce need be shown for a Hobbs Act offense. See United States v. Hathaway, 534 F.2d 386, 396 (1st Cir.), cert. denied, 429 U.S. 819, 97 S.Ct. 64, 50 L.Ed.2d 79 (1976); United States v. Daley, 564 F.2d 645, 649 (2d Cir.1977), cert. denied, 435 U.S. 933, 98 S.Ct. 1508, 55 L.Ed.2d 530 (1978); United States v. Traitz, 871 F.2d 368, 390 (3d Cir.), cert. denied, 493 U.S. 821, 110 S.Ct. 78, 107 L.Ed.2d 44 (1989); United States v. Billups, 692 F.2d 320, 321 n. 7 (4th Cir.1982), cert. denied, 464 U.S. 820, 104 S.Ct. 84, 78 L.Ed.2d 93 (1983); United States v. Gerald, 624 F.2d 1291, 1299 (5th Cir.1980), cert. denied, 450 U.S. 920, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981); United States v. Harding, 563 F.2d 299, 302 (6th Cir.1977), cert. denied, 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978); United States v. Crowley, 504 F.2d 992, 997 (7th Cir.1974); United States v. Shackelford, 494 F.2d 67, 75 (9th Cir.), cert. denied, 417 U.S. 934, 94 S.Ct. 2647, 41 L.Ed.2d 237 (1974); United States v. Bolton, 68 F.3d 396, 398 (10th Cir.1995); United States v. Frost, 61 F.3d 1518, 1524 (11th Cir.1995).

In a previous decision denying defendants' pretrial motions, this court held that Lopez does not invalidate this wealth of precedent. United States v. Arena, 894 F.Supp. 580, 584-85 (N.D.N.Y.1995).[2] Specifically, the court held that it was sufficient if the government pled and proved an effect upon interstate commerce by a "depletion of assets" theory.[3] Id. Since that decision, several circuit courts of appeals have considered the issue of whether Lopez affects existing law on the interstate commerce element of the Hobbs Act, and concluded that it does not. The Tenth Circuit for example, in comparing the Gun-Free School Zones and Hobbs Acts, observed that "[u]nlike possession of a firearm in a school zone ... robbery and extortion are activities that through repetition can substantially affect interstate commerce." United States v. Bolton, 68 F.3d 396, 399 (10th Cir.1995). The Bolton court specifically reaffirmed both the de minimis standard, id., and the viability of the depletion of assets theory, id. at 398. See also United States v. Farmer, 73 F.3d 836, 843 (8th Cir.1996) and United States v. Stillo, 57 F.3d 553, 558 n. 2 (7th Cir.1995) for the same holding. This court agrees with Bolton that the "Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce," 68 F.3d at 399, and therefore "the de minimis character of individual instances arising under [this] statute is of no consequence," Lopez, 514 U.S. at ----, 115 S.Ct. at 1629 (citations omitted).

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2. Number 37 on the docket sheet.

3. Under this doctrine "commerce is affected when an enterprise, which either is actively engaged in interstate commerce or regularly purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing its potential as a purchaser of such goods." Arena, 894 F.Supp. at 584-85 (citing United States v. Collins, 40 F.3d 95, 101 (5th Cir.1994) and United States v. Morgano, 39 F.3d 1358 (7th Cir.1994)); see also United States v. Zeigler, 19 F.3d 486, 490 (10th Cir.), cert. denied, 513 U.S. 1003, 115 S.Ct. 517, 130 L.Ed.2d 422 (1994); United States v. Elders, 569 F.2d 1020, 1025 (7th Cir.1978).

Given these standards, the court finds that the evidence adduced at trial was sufficient for a rational trier of fact to conclude that interstate commerce was affected by the butyric acid attacks. There was testimony that Planned Parenthood and Dr. Yoffa's offices purchased medical supplies from out- of-state and that services were offered to out-of-state patients. Either of these connections can support Commerce Clause-based jurisdiction for the specific conduct prosecuted under the Hobbs Act in this case. Support for this holding can be found in the legislative history of the Freedom of Access to Clinic Entrances ("FACE") Act wherein Congress studied the effect upon interstate commerce of violent and obstructive conduct directed towards reproductive health centers. See, e.g., H.R.Conf.Rep. No. 488, 103d Cong., 2d Sess. 7 (1994), reprinted in 1994 U.S.C.C.A.N. pp. 699, 724, 724 (finding that violent protest conduct directed at reproductive health clinics interferes "with the interstate commercial activities of health care providers"); H.R.Rep. 306, 103d Cong., 2d Sess. 7-8 (1993), reprinted in 1994 U.S.C.C.A.N. 699, 704-05 (relating story of patient who traveled from Virginia to Kansas to obtain abortion for fetus with malformed heart).

The aggregate effect of violence directed at reproductive health facilities upon interstate commerce is actually increasing the interstate nature of abortion services. Because of the fear of violence, the number of doctors performing these services has declined, particularly for women in rural areas, leaving only 17% of U.S. counties with abortion providers. H.R.Rep. No. 306 at 8, 1994 U.S.C.C.A.N. at 705. This in turn has compelled the physicians who do perform abortions to travel periodically to underserved communities in neighboring states, as did the late Dr. David Gunn. See H.R.Rep. No. 306 at 7, 1994 U.S.C.C.A.N. at 704. For further support that obstructive and violent conduct

targeting reproductive health clinics constitutes interference with interstate commerce to a degree sufficient enough to satisfy Lopez, see United States v. Wilson, 73 F.3d 675, 678-688 (7th Cir.1995) and Cheffer v. Reno, 55 F.3d 1517, 1520 (11th Cir.1995) wherein the post- Lopez constitutionality of the FACE Act was upheld.

Furthermore, it can hardly be doubted that the specific act of a butyric acid attack against a medical clinic is an activity which, through repetition, has a substantial effect on interstate commerce; Congress found as much in considering the FACE Act. See H.R.Rep. No. 306 at 9, 1994 U.S.C.C.A.N. at 706 (57 butyric acid attacks against clinics in 1992 with estimated cleanup costs of $500,000). The court is of the opinion that these congressional findings respecting the effect upon commerce of antiabortion violence supports the conclusion that the government has proven a sufficient nexus with interstate commerce to invoke federal jurisdiction in this case.

Because a rational juror could have readily found that the defendants' conduct interfered with interstate commerce, the court will not disturb their verdict on this ground.

2. "Obtaining" of Property

Defendant Arena argues that the facts proven by the government do not constitute "obtaining" of property within the meaning of the Hobbs Act. Defendant posits that "[i]f he [the extorter] doesn't control the property, he doesn't exercise dominion over that property, he doesn't violate the statute." Transcript of Motions, Exh. A attached to Wentworth Mem. of Law, Doc. 74, at 6. Arena does not claim that the benefit must accrue to the extorter, id. at 8, 9, but that the benefit must at least be diverted to someone else by the extorter, id.

at 10. Arena maintains that the "obtaining" must be done with a "larcenous intent." Id. at 7. This argument, that a defendant must have the specific intent to steal in order to be convicted of Hobbs Act extortion, is premised on the notion that terms in the Hobbs Act must be defined by reference to the New York extortion statute from which the federal law was derived. Id. at 6-7. Defendant Wentworth joins these arguments, arguing that the mere destruction or deprivation of property is not the obtaining of property. Id. at 25.

The court starts from the uncontested precept that the right to conduct a lawful business free from threats and violence is property within the meaning of the Hobbs Act. Town of West Hartford v. Operation Rescue, 915 F.2d 92, 101 (2d Cir.1990), cert. denied sub nom. Syversen v. Summit Women's Ctr. West, Inc., 510 U.S. 865, 114 S.Ct. 185, 126 L.Ed.2d 144 (1993); United States v. Tropiano, 418 F.2d 1069, 1077 (2d Cir.1969), cert. denied, 397 U.S. 1021, 90 S.Ct. 1262, 25 L.Ed.2d 530 (1970). Like other terms in the Act, "obtaining" is given a broad definition. West Hartford, 915 F.2d at 101. For instance, an extorter need not receive the benefit of his conduct. United States v. Green, 350 U.S. 415, 420, 76 S.Ct. 522, 525, 100 L.Ed. 494 (1956); United States v. Clemente, 640 F.2d 1069, 1079-80 (2d Cir.), cert. denied, 454 U.S. 820, 102 S.Ct. 102, 70 L.Ed.2d 91 (1981).

But defendants argue that the property must flow to someone; the intent must be larcenous, not merely mischievous. Transcript of Motions, Exh. A attached to Wentworth Mem. of Law, Doc. 74, at 6. Defendant Arena relies upon a number of cases for this mens rea requirement--not only in his post-trial motions, but in his pretrial motions and charge conference arguments. See id. at 6-7; Arena Mem. of Law in Support of Request to Charge, Doc. 85, at 4. The court has examined these authorities and

found them fatally distinguishable. United States v. Nedley, for instance, stands for the proposition that robbery under the Hobbs Act requires the specific intent to steal. 255 F.2d 350, 357 (3d Cir.1958). The court has no quarrel with that contention, since the instant case involves extortion.[4] Similarly, Evans v. United States concerned extortion under color of official right, not extortion by force or fear. Compare, e.g., 504 U.S. 255, 261, 112 S.Ct. 1881, 1885, 119 L.Ed.2d 57 (1992) ("Congress has unquestionably expanded the common-law definition of extortion to include acts by private individuals pursuant to which property is obtained by means of force, fear, or threats.") with id. at 263-64, 112 S.Ct. at1886-87 ("Although the present statutory text is much broader than the common-law definition of extortion because it encompassed conduct by a private individual as well as conduct by a public official, the portion of the statute that refers to official misconduct continues to mirror the common-law definition.") (footnotes omitted). Arena's reliance on United States v. Enmons, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1972) is also misplaced, because that case was decided on the basis that the force or fear used was not "wrongful," id. at 399-400, 93 S.Ct. at 1009-10, not because the defendants lacked the intent to steal.

The only precedent which states the proposition that extortion by force or fear is a larceny-type offense is United States v. Sweeney, 262 F.2d 272, 275 & n. 3 (3d Cir.1959). For support of that point, the Third Circuit cited Nedley, which has been distinguished, and in footnote 3, made reference to the New York state definition of extortion. The court concedes that prior to the adoption of the Hobbs Act the New York crime of extortion was a specific intent crime,

4. Although at least one appellate court has opined that Nedley 's holding that Hobbs Act robbery is a specific intent crime "may have been wrongly decided." United States v. Thomas, 8 F.3d 1552, 1563 (11th Cir.1993).

e.g., People v. Clark, 242 N.Y. 313, 328, 151 N.E. 631, 636 (1926), and remains so today, N.Y.Penal Law § 155.05(1) & (2)(e) (McKinney 1988 & Supp.1996) (all forms of larceny require "intent to deprive another of property or to appropriate the same"). However, that concession does not compel the conclusion that Hobbs Act extortion requires specific intent. Indeed, the cases interpreting the federal crime of extortion are to the contrary.

This precise holding--that is, Sweeney 's conclusion that Hobbs Act extortion requires specific intent--was considered and rejected in United States v. Bryson, 418 F.Supp. 818, 826 (W.D.Okla.1975). Similarly, in United States v. Furey, the district judge observed that a proposed version of the Hobbs Act included the modifying phrase "knowingly or willfully." 491 F.Supp. 1048, 1059 (E.D.Pa.), aff'd, 636 F.2d 1211 (3d Cir.1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 304 (1981). The judge reasoned that the omission in the final version "clearly indicates that the Hobbs Act was not intended to be a specific intent statute." Id. Other cases are in accord: United States v. Warledo, 557 F.2d 721, 729 n. 3 (10th Cir.1977); United States v. Green, 246 F.2d 155, 159 (7th Cir.), cert. denied, 355 U.S. 871, 78 S.Ct. 122, 2 L.Ed.2d 76 (1957). This court agrees with these authorities and holds that extortion under the Hobbs Act does not require the specific intent to deprive or appropriate another's property, but is rather a general intent crime.

Thus, even if defendants did not possess the specific intent to steal the property of the victims, they still could have "obtained" their property for purposes of the Hobbs Act. The government directs the court's attention to United States v. Lewis, a Seventh Circuit case that supports the contention that an extorter can "obtain" property without receiving or directing a tangible benefit. Footnote 3 of that opinion reads

> Most extortionists undoubtedly seek a direct and tangible benefit from their demands. Others do not, however, because they may be motivated only by a desire to humiliate the victim or a third party, and the discomfort they cause is the gain they derive from the scheme. Nonetheless, the Hobbs Act prohibits certain interferences with interstate commerce, and an extortion demand may have the proscribed deleterious effect on such commerce, even though the defendant never receives a transfer of property from the victim.

797 F.2d 358, 364 n. 3 (7th Cir.1986), cert. denied, 479 U.S. 1093, 107 S.Ct. 1308, 94 L.Ed.2d 162 (1987).

In this case, the jury had before it proof from which it could rationally conclude that the gain derived by Arena and Wentworth was the closing, even if temporary, of clinics offering medical services they considered abhorrent and immoral; and/or the publicity such conduct generated for their cause; and/or the potential for intimidating other physicians from performing abortions. Arena and Wentworth benefited not only from the psychic and moral assurance that there were, at least for a time, two fewer facilities where women could obtain abortions, but from the symbolic victory for their ideology. In accord is Northeast Women's Ctr. v. McMonagle, a civil RICO action against antiabortion activists wherein the predicate offenses were Hobbs Act violations. 868 F.2d 1342 (3d Cir.), cert. denied, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989). The Third Circuit rejected defendant's challenge on appeal that an economic motive was required to sustain an extortion charge. Id. at 1349.[5] In this regard, this court points out that

5. The defendants in McMonagle also claimed that, even if the Hobbs Act normally does not require an economic motive, it is a necessary element when the Hobbs Act serves as the predicate of a RICO charge. 868 F.2d at 1350. The Third Circuit rejected that argument, id., and the Supreme Court recently resolved

McMonagle, a 1989 Third Circuit case, appears to be at odds with that circuit's holding from thirty years earlier in Sweeney that extortion under the Hobbs Act requires a larcenous intent.

In obtaining the benefits described above, the defendants induced the victims to consensually depart with their right to conduct a lawful business free from violence and threats. Cf. id. Because the evidence was easily sufficient to prove beyond a reasonable doubt that defendants obtained the property of defendant with the requisite intent, a judgment of acquittal is improper, and a new trial would not further the interests of justice.

3. Consent Induced By Force, Violence, or Fear

Defendant Arena argues that in order for an extorter to induce the consensual relinquishment of property, the victim must know the extorter's identity. Transcript of Motions, Exh. A attached to Wentworth Mem. of Law, Doc. 74, at 10. Wentworth agrees, contending that there must be some precursory communication of a threat in order for the crime of extortion to be committed. Wentworth Mem. of Law, Doc. 74, at 7. This, the court believes, ignores the plain wording of the statute which provides that the consent of the victim can be induced by "actual or threatened force, violence, or fear." 18 U.S.C. § 1951(b)(2) (italics added).

Furthermore, the weight of authority contravenes

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the circuit split that had developed around this issue in the appeal of another civil RICO action involving Hobbs Act predicates against antiabortion protesters. National Org. for Women v. Scheidler, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994). In that case, the Supreme Court held that no economic motive was required. Id. at ----, 114 S.Ct. at 806.

defendants' assertions. For instance, the Second Circuit in United States v. Billups stated that "[t]he fear need not be the consequence of a direct or implicit threat by the defendant." 692 F.2d 320, 330 (2d Cir.1982) (citing United States v. Duhon, 565 F.2d 345 (5th Cir.), cert. denied, 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed.2d 802 (1978)). Similarly, in United States v. Capo the Second Circuit held that "it is not necessary that the fear have been caused by the defendant" in order to sustain a Hobbs Act extortion conviction. 791 F.2d 1054, 1062 (2d Cir.1986), rev'd on other grounds, 817 F.2d 947 (2d Cir.1987) (en banc).[6] In support of this point, the Capo panel cited to Duhon and to United States v. Margiotta, 688 F.2d 108, 135 (2d Cir.1982), cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983). The reference to Margiotta is presumably because that opinion endorses a Hobbs Act extortion theory wherein the defendant exploits the fear of a victim, even though the victim's fear was not caused by any initiative of the defendant. See id.

The court is of the opinion that these precedents are equally applicable to a theory of extortion by actual use of force or violence. That is, it is not necessary that Planned Parenthood or Dr. Yoffa knew that defendants were responsible for the butyric acid attacks. What is required is that defendants did

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6. The en banc reversal was authored by Judge Pratt, who dissented in the panel decision. Comparison of his dissent with his majority opinion in the en banc rehearing makes it clear the proposition cited above is good law in this circuit. The district judge in that case had instructed the jury that it was not "necessary that the Government prove that the fear of economic loss was the consequence of a direct threat made by the defendant. Nor is it necessary for the Government to prove that the defendant actually created the fear in the minds of his victims, or was responsible for creating that fear." 791 F.2d at 1071. Judge Pratt did not take issue with this instruction in his dissent, but instead opined that it was "a proper distillation of the law of extortion by wrongful use of fear." Id. at 1072. And the en banc rehearing reiterated that "the panel majority and dissent agreed on the propriety of this instruction." 817 F.2d at 947. The reason for reversal was the insufficiency of the evidence of fear of economic loss. Id. at 952.

(or attempted to do) and conspired to obtain the property of the victims by inducing them, through the wrongful use of actual force or violence, to consensually give up their property. The conduct supporting the charges of Hobbs Act extortion in the McMonagle case included unlawful trespasses into clinics, assaults upon clinic employees, and vandalism--i.e., actual force and violence rather than threats. 868 F.2d 1342, 1345 (3d Cir.), cert. denied, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989).

In the instant matter, the evidence proved beyond a reasonable doubt that the actual use of force or violence induced the victims to consensually relinquish their property to defendants. More specifically, the butyric acid attacks induced Planned Parenthood and Dr. Yoffa to decide to temporarily close their businesses. The proof was sufficient for the jury to find that this closing, or perhaps the actual termination of these businesses, was the end sought by defendants.

4. Federalism

Although the court has addressed all the defendants' particularized challenges to the applicability of the Hobbs Act, defendant Wentworth has raised a more general complaint that the crime of federal extortion was never meant to apply to what amounts to criminal mischief. Wentworth Mem. of Law, Doc. 74, at 14. For this suggestion, Wentworth relies on this language from the en banc rehearing in United States v. Capo:

> It is the sensitive duty of federal courts to review carefully the enforcement of our federal criminal statutes to prevent their injection into unintended areas of state governance.... Exercising that duty, we find it necessary to nullify this attempted application of the Hobbs Act to circumstances it

> was never meant to reach. Incremental extensions of federal criminal jurisdiction arguably present a more pernicious hazard for our federal system than would a bold accretion to the body of federal crimes. At a minimum, a clear extension of federal responsibility is likely to be sufficiently visible to provoke inquiries and debate about the propriety and desirability of changing the state-federal balance. Less abrupt, more subtle expansions, however, such as nearly occurred here, are less likely to trigger public debate, and, yet, over time cumulatively may amount to substantial intrusions by federal officials into areas properly left to state enforcement. By holding that the Hobbs Act does not encompass state-law bribery, we seek to demarcate a point beyond which Congress intended federal prosecutors not to pass.

817 F.2d 947, 955 (2d Cir.1987) (citation omitted).

This court agrees with the sentiments expressed in this conclusory passage, but defendants misconstrue its meaning. The Second Circuit in the Capo rehearing did not refuse to apply the Hobbs Act to conduct which fit the parameters of the statute; they concluded that the conduct in that case did not violate the statute. Capo involved a job-selling scheme. The defendants secured employment at the Kodak plant in Rochester for people paying amounts ranging from $500 to $1000. Id. at 949-50. These facts supported a conviction of bribery or solicitation of bribery, not extortion. The job-seekers in Capo expected positive benefits if they paid the job-sellers; they did not fear loss of property they already held if they refused to pay. See id. at 954-55. It is evident that, regardless of what Congress' intent was, the Hobbs Act as printed in the United States Code did not proscribe the conduct proven in Capo.

Likewise, Justice Stewart in United States v. Enmons

concluded his majority opinion with these expansive statements:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

410 U.S. 396, 411, 93 S.Ct. 1007, 1015, 35 L.Ed.2d 379 (1972).

Despite the seeming broad sweep of these words, the Court in Enmons did not decline to apply the Hobbs Act to conduct which satisfied every element of the crime. To the contrary, it was held that any use of force or violence in that case was not "wrongful" within the meaning of the statute. See id. at 399- 400, 93 S.Ct. at 1009-10. Defendants have unsurprisingly not found any precedents that would permit this court to overturn a Hobbs Act conviction upon the sole reason that it was obtained by a novel prosecution theory,[7]

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7. The court has located only one other reported case involving a Hobbs Act prosecution against violent antiabortion protestors: United States v. Anderson, 716 F.2d 446 (7th Cir.1983). Although actual force was used in that case, viz. kidnapping, the government's theory evidently was extortion by threats. See id. at 450.

Both National Org. for Women v. Scheidler, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994) and Northeast Women's Ctr. v. McMonagle, 868 F.2d 1342 (3d Cir.), cert. denied, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989) involved civil RICO suits with Hobbs Act predicates. Those Hobbs Act predicates were based on the extortionate activity of antiabortion activists by means of the actual use of force and violence. 510 U.S. at ---- - ----, 114 S.Ct. at 801-02; 868 F.2d at 1345-46.

notwithstanding that the proven conduct fell clearly within the proscription of the statute.

The court therefore believes this case is more akin to United States v. Brecht wherein the Second Circuit reasoned that

> Since Congress has not limited the scope of extortion save for the statutory definition itself, we can formulate no judicial rule that would draw a practical line between one type of extortion that is covered by the Hobbs Act and another type which is not.

540 F.2d 45, 52 (2d Cir.1976), cert. denied, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573 (1977).

The court of appeals in Brecht, although perhaps reluctantly, did not refuse to punish conduct squarely covered by the Hobbs Act merely because the circumstances of the case were novel, or out of speculation that Congress did not anticipate the law would be applied in such a fashion. This court similarly refuses to fashion ad hoc exemptions from the Hobbs Act for certain defendants whose conduct is otherwise prohibited.

The Second Circuit was willing, however, to admonish the United States Attorney to "exercise careful judgment" when deciding whether to commence a federal prosecution for a crime that treads so closely to a purely state offense. See id. n. 14. That admonition surely carries double-weight

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Two other civil RICO claims involving Hobbs Act predicates were decided in favor of antiabortion defendants. Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir.1990), cert. denied sub nom. Syversen v. Summit Women's Ctr. West, Inc., 510 U.S. 865, 114 S.Ct. 185, 126 L.Ed.2d 144 (1993); Town of Brookline v. Operation Rescue, 762 F.Supp. 1521 (D.Mass.1991). But the holdings in those cases resulted from the axiom the Supreme Court discarded in NOW v. Scheidler: that an economic motive was required for RICO violations. See supra note 5.

when the state has already successfully obtained convictions or guilty pleas for state crimes punishing the same conduct by the same defendants.

The rational finder of fact could have determined that every element of extortion by the actual use of force or violence was proven beyond a reasonable doubt in this matter. No post-trial relief is available upon this ground.

C. Incompetence of Codefendant's Counsel

In an argument seldom encountered, defendant Arena claims the incompetence of the attorney for codefendant Wentworth prejudiced him to the extent that new, separate trials should be ordered. Arena Notice of Motion, Doc. 72, at 6 (Mem. of Law at 1). The errors Arena claims were committed by codefendant's counsel include: an opening statement without focus or theory; basic misunderstandings about the law; a rambling, incoherent, and inaudible speaking style; and cross-examinations of government witnesses that elicited testimony damaging to both defendants. Id. at 3. Arena points particularly to the cross-examination by his codefendant's counsel of Michelle Campbell for instances of the mistakes listed above. Id. Finally, Arena notes that in his closing argument, counsel for codefendant Wentworth "constantly referred to facts not in the record and was admonished by the Court for possible contemptuous conduct." Id. at 4. Overall, the collective errors of his codefendant's counsel are said to have "alienated the jury to the point where they could not fairly assess the evidence against Mr. Arena," id.; the incompetence of counsel for Wentworth had a "prejudicial spillover" which undermined his right to a fair trial, see id. at 7 (Arena Mem. of Law at 2).

Arena analogizes the claimed error to cases wherein the defenses of codefendants are antagonistic and to ineffective assistance of counsel cases. Id. at 6-8 (Arena Mem. of Law at 1-3). Neither Arena nor the United States has cited cases in which this specific issue has been considered, and the court has not discovered any helpful precedent. In one of the not uncommon coincidences of legal research, the issue was addressed in a postconviction opinion on a motion to vacate sentence in Tropiano v. United States, 323 F.Supp. 964 (D.Conn.1971), the prior appellate opinion in which was cited in Part II.B.2 supra, and appears in the papers of both the government and defendants at various places. But although the district court in that case observed that "the Sixth Amendment has nothing to do with a defendant's preference for having a co-defendant represented by counsel acceptable to defendant," there was no allegation of incompetence as in the instant matter. Id. at 966.

Whether this court treats Arena's claim as analogous to a Sixth Amendment ineffective assistance of counsel argument, an antagonistic defenses argument, an argument that different evidence as to two codefendants has created a "prejudicial spillover," or as a more general claim of denial of due process, there must be evidence that Arena was prejudiced thereby. See Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984) (for an ineffective assistance claim, must be reasonable probability that but for any unprofessional errors, trial verdict would have been different); United States v. Potamitis, 739 F.2d 784, 790 (2d Cir.), cert. denied, 469 U.S. 934, 105 S.Ct. 332, 83 L.Ed.2d 269 (1984) (substantial prejudice, in severance motion based on antagonistic defenses or prejudicial spillover, means that a miscarriage of justice has occurred); 8A James Wm. Moore, Moore's Federal Practice ¶ 33.01[4] & n. 3 (2d ed. 1995) (harmless error doctrine

generally applicable to motions for new trial). There does not appear to be any probability that Arena was reasonably or substantially prejudiced by the conduct of counsel for codefendant Wentworth.

Arena points to the indelicate and fumbling cross-examination of government witness Michelle Campbell by codefendant's attorney as particularly damaging to both him and defendant Wentworth. Arena Notice of Motion, Doc. 72, at 3-4. "After the co-defendant's lawyer finished cross-examining Campbell the trial was over" for Arena, it is argued, meaning that the incompetent cross- examination doomed Arena's defense to failure. See id. Yet, it is hard to believe this is so. Campbell testified only as to facts that Arena did not challenge. Arena's strategy at trial never relied on contesting that the alleged conduct occurred. In his opening statement to the jury, counsel for Arena admitted that Arena, "[a]cting in concert with Michelle Campbell and Michelle Wentworth, ... intentionally damaged the property of Jack Yoffa ... and intentionally damaged the property of Planned Parenthood." Transcript of Opening Remarks, Exh. A attached to Government's Response to Defendant's Post-Trial Motions, Doc. 77, at 9. Arena's defense at trial was essentially identical to the post-trial motions addressed in Part II.B above: that the conduct did not constitute extortion under the Hobbs Act. Campbell's testimony was not particularly relevant to this line of defense, as noted by counsel for Arena in his opening statement:

> What light will she [Michelle Campbell] shed on whether or not any extortion was committed here? I submit to you none. I don't see the value of her testimony. Nobody disputes that it happened.

Id. at 11.

The cross-examination of Michelle Campbell by counsel

for codefendant Wentworth did not elicit any testimony that could affect the genre of defense proffered by Arena. Therefore, even if the performance of counsel for Arena's codefendant was deficient, there is no reasonable probability "that but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2067. Since by Arena's own admission Michelle Campbell's testimony was irrelevant to his defense, any incompetence in her cross-examination by Wentworth's counsel hardly could have prejudiced him.

Arena also contends that the cross-examination of Dr. Jack Yoffa and of Jeffrey Gilbert, the director of Planned Parenthood, by counsel for Wentworth was inept and elicited testimony highly prejudicial to both defendants. Arena Notice of Motion, Doc. 72, at 3. Specifically, Dr. Yoffa is said to have disclosed on cross that he "felt threatened as a result of the violent act to his property." Id. Certainly this testimony was relevant to the jury's determination of whether the victim's consent was induced by fear, force, or violence. Yet this was not the only evidence presented to the jury which tended to support the government's case in this respect: the direct examinations of Dr. Yoffa and Mr. Gilbert also revealed the fear caused by the attacks. In determining whether an attorney's handling of the cross- examination of a witness is deficient, the court may consider many factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Mason v. Scully, 16 F.3d 38, 44 (2d Cir.1994) (citations

omitted) (italics added).

The damaging response during cross-examination was only cumulative over evidence adduced on direct. There was no reasonable probability of prejudice from this error, if it was such.

As another example of incompetence, Arena charges that the cross-examination of Jeffrey Gilbert revealed "that the defendants belonged to organizations that had reputations for violence." Id. Defendant Arena is apparently referring to pro-life organizations. But Michelle Campbell's testimony on direct revealed the defendants' active membership in these organizations also. Indeed, it is difficult to imagine how the jury in this case could not have heard or seen competent evidence expertly and deliberately elicited or proffered that indicated the defendants' membership in these groups. Counsel for Arena mentioned three pro-life advocacy groups--Operation Rescue, the Lambs of Christ, and the Right to Life Federation--in his opening remarks. Transcript of Opening Remarks, Exh. A attached to Government's Response to Defendants' Post Trial Motions, Doc. 77, at 7. Additionally, both the government and counsel for defendant Arena reminded the jury several times that the propriety of abortion was not at issue in this case; whether the defendants committed extortion under the Hobbs Act was.

More generally, Arena appears to be complaining that the purported incompetence of counsel for Wentworth was so clownish that the jury was alienated against both defendants, depriving Arena from his constitutional right to a fair trial. Initially, the court notes that most of its admonitions to counsel for Wentworth were out of the presence of the jury, including the warning about the attorney's possibly contemptuous conduct during his summation. For the very

few that were not, the court instructed the jury that the lawyers were not on trial. They were also charged that they should not show prejudice against an attorney or his client simply because the attorney has made objections. Finally, the jurors were warned not to draw any inferences against an attorney admonished by the court. The court believes these instructions were sufficient to mitigate any prejudice to Arena caused by the alleged negative opinion the jury formed of the attorney representing Michelle Wentworth. Furthermore, the contention that the jury would allow its poor opinion of Wentworth's lawyer to influence and overcome the decision they would otherwise reached in the case, i.e. to acquit Arena, would require this court to conclude that the jury acted in an arbitrary, whimsical, or capricious manner--an assumption that Strickland directs us to reject. 466 U.S. at 694-95, 104 S.Ct. at 2067-68.

The court is also of the opinion that many of the errors Arena complains of are the kind that might draw ridicule from other trial lawyers, but would most likely go unnoticed by a jury of laypersons. If counsel for Wentworth did misunderstand "basic cross-examination skills dealing with prior inconsistent statements; the admissibility of hearsay evidence; the laying of proper evidentiary foundations; [and] refreshing recollections," Arena Notice of Motion, Doc. 72, at 4, another litigator might well deride counsel, but nonlawyers are unlikely to perceive this ignorance of the technical rules of evidence. That is why it is not merely the errors themselves that are the focus of inquiry, but what actual prejudice to the defense case was caused by the errors. See Strickland, 466 U.S. at 691-92, 104 S.Ct. at 2066-67.

Lastly on this issue, the court observes that prejudice is unlikely in this case because the evidence was overwhelming. See United States v. Hurtado, 47 F.3d 577,

584 (2d Cir.1995). As has been said, Arena did not contest that the conduct happened, but only that the elements of extortion under the Hobbs Act were not met. In these circumstances the court finds it incredible that the jury would have accepted Arena's defense, but for the occasional tactical misstep by counsel for codefendant. Hence the court rejects this argument and denies the motion for a new trial upon this ground.

D. Constitutionality of Subsequent Federal Prosecution

Defendant Wentworth makes two distinct arguments challenging the constitutionality of her prosecution in federal court for conduct she was already tried and convicted of in state court. First, Wentworth contends that the subsequent federal prosecutions were improper because they were initiated at the request of the Onondaga County District Attorney because he was dissatisfied with the sentence imposed by the state judge. Wentworth Mem. of Law, Doc. 74, at 12-13.

The second argument is that the subsequent prosecution violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. Although Wentworth did not specifically broach this point at the post-trial motion hearing, the court addresses it here because the government did discuss it, because it seems intertwined with whatever inarticulate claim Wentworth is attempting to make in her first argument, and because the issue has arisen several times during these proceedings.

1. Conduct of the Onondaga County District Attorney

The court confesses that it does not understand whether Wentworth maintains that the District Attorney broke a

promise made in exchange for John Arena's guilty plea, or simply that the District Attorney's motive in referring the case to the United States Attorney for possible federal prosecution was improper and violated one or more of Wentworth's constitutional rights. Both variants of this argument though are poorly developed and unpersuasive.

As for the first possibility, the court observes simply that Wentworth did not plead guilty as did John Arena: she proceeded to trial and was convicted. How could there have been any agreement for the state prosecutor to break? In response to questioning from the court in this regard, Wentworth answered that such an agreement may have induced Arena to plead guilty. To this explanation, the court has five objections. First, Wentworth has not produced any evidence of an express or implicit agreement that there would be no federal prosecution if Arena pled guilty to the state charges. Second, the state plea allocution for Arena reveals no promises:

> THE COURT: I've made no representations about the federal government and what they're going to do in view of what I might do here in this courtroom.

Transcript of Plea, attached to Letter from AUSA John G. Duncan, Jan. 24, 1996.

This disclaimer suggests that Arena was under no misconceptions that his plea would preclude subsequent prosecution in federal court. Third, a violation of a promise made to her codefendant in exchange for his plea would not violate any right of Wentworth, who chose to be tried, as this court observed at oral argument. Fourth, the District Attorney had no power to prevent the United States from commencing a prosecution against Wentworth in any event. And fifth, even if the promise was merely not to refer the case to the United States Attorney (not to actually prevent

federal prosecution), a violation of that agreement might be remedied by the state court judge, but not by this court. In the absence of collusion between state and federal prosecutors amounting to a violation of the Double Jeopardy Clause, discussed below, this court cannot discipline the United States Attorney and his assistants and/or dismiss a federal indictment because a state prosecutor may have broken a plea promise.

A second possible characterization of this argument is that the District Attorney's motivation in referring this case to federal prosecutors-- that is, his dissatisfaction with the perceived "light" sentence the state court judge imposed upon defendants--was improper and somehow deprived Wentworth of an undefined constitutional right. The argument is vague, rests on speculation, and is offered without supporting precedent. For instance, it presupposes that the U.S. Attorney would not have prosecuted this case without the recommendation of the District Attorney: this court is not at all convinced of that. Moreover, Wentworth has not explained why such a motivation, even if held, would be improper. Certainly there has been no explanation of how it would be so improper that the referral rose to the level of a constitutional violation. Nor has the court been apprised of which constitutional guarantee has allegedly been trodden upon.

With so little direction from defendant, the court declines to pursue this line of argument further and will proceed to the issue of double jeopardy.

2. Double Jeopardy

The dual sovereignty doctrine is an exception to the Double Jeopardy Clause of the Fifth Amendment to the

United States Constitution. Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) (upholding state prosecution after federal prosecution); Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959) (upholding federal following state). The Double Jeopardy Clause does not prevent two governments, e.g. the United States and New York, from prosecuting one defendant for the same conduct, "for the defendant has offended both sovereigns." United States v. 38 Whalers Cove Drive, 954 F.2d 29 (2d Cir.), cert. denied sub nom. Levin v. United States, 506 U.S. 815, 113 S.Ct. 55, 121 L.Ed.2d 24 (1992).

There is an exception to the dual sovereign exception: dicta in the Bartkus case suggests that the Constitution is offended when the second sovereign is "merely a tool" of the first, or when the subsequent prosecution is "a sham and a cover" for the former prosecution. 359 U.S. at 123-24, 79 S.Ct. at 677-78. Although the exception is narrow, United States v. Aboumoussallem, 726 F.2d 906, 910 (2d Cir.1984), it remains an available argument for twice-prosecuted defendants, United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 494 n. 9 (2d Cir.1995).

The evidence of collusion between state and federal prosecutors in this case falls far below the lofty threshold necessary to trigger the Bartkus exception. "[E]ven significant cooperation between state and federal authorities does not provide a basis for applying the Bartkus exception." Id. at 495 (citing inter alia Whalers Cove, 954 F.2d at 38). Several circuits have held that not even the cross-designation of a state district attorney to prosecute a federal crime, or vice-versa, suffices to overcome the dual sovereignty doctrine. Id. (citing cases from the 4th, 7th, 9th, and 11th circuits). It is alleged that the District Attorney referred this case to the U.S. Attorney. There is an additional unsupported

allegation that the District Attorney took the unusual step of traveling to Washington "to convince officials there of the necessity for and the virtue of proceeding." Letter from Carl F. Guy, Esq., Jan. 29, 1996.[8] There is no indication that the District Attorney participated in the process of federal investigation, the drafting and presentment of the indictment to the grand jury, pretrial practice and preparation, or the actual conduct of the trial in this matter. Nor is there any evidence that the state stands to gain a significant pecuniary benefit by this subsequent proceeding, a fact which convinced the Second Circuit in All Assets to remand the case to the district court for further fact-finding. 66 F.3d at 495-96. Dispositively, the evidence does not tend to show that the U.S. Attorney was a tool of the District Attorney, or that the federal prosecution was a sham or cover for another state prosecution: the Bartkus exception is inapplicable.

E. Additional Arguments of John Arena

In defendant Arena's statement following oral argument upon these post- trial motions, the court heard three new arguments which it will dispatch here.

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8. Convincing Department of Justice officials in Washington of the wisdom of a subsequent federal prosecution is necessary under the Petite policy, now incorporated in the United States Attorneys' Manual. That policy was discussed in the only case the court has located dismissing a federal indictment following a state prosecution for the same conduct. United States v. Belcher, 762 F.Supp. 666, 673-74 (W.D.Va.1991). That policy was apparently followed in this case. Letter from Jo Ann Harris, Asst. Att'y Gen., Feb. 17, 1995. However, even if the Justice Department's internal procedure was not followed, it would confer no substantive rights upon defendants. United States v. Howard, 590 F.2d 564, 567-68 (4th Cir.), cert. denied, 440 U.S. 976, 99 S.Ct. 1547, 59 L.Ed.2d 795 (1979); United States v. Thompson, 579 F.2d 1184, 1189 (10th Cir.) (en banc), cert. denied, 439 U.S. 896, 99 S.Ct. 257, 58 L.Ed.2d 243 (1978). Conversely, the fact the U.S. Attorney complied with the Justice Department's rules concerning successive prosecutions would not save an indictment that otherwise offended the Double Jeopardy Clause.

1. Presentence Release

Defendant Arena first asked that he be released from detention. Since he has already been convicted, the court treats this request as a motion for presentence release pursuant to 18 U.S.C. § 3143(a). Magistrate Judge DiBianco originally concluded that defendant Arena was charged with a "crime of violence" and that he constituted a danger to the community that no conditions of release could reliably ameliorate and consequently ordered him detained pending trial. Order, Doc. 16. Undertaking a de novo review of that decision, this court concurred. United States v. Arena, 894 F.Supp. 580, 585-86 (N.D.N.Y.1995). The Second Circuit affirmed. Mandate/Order, Doc. 39. Thereafter, an application was made to Justice Ginsburg, who also refused relief. The court in considering defendant's motion for release will continue to classify the crime he has now been convicted of as one of violence. See 18 U.S.C. § 3156(a)(4).

Because defendant was convicted of a crime of violence and there has not been any recommendation from the government that no term of imprisonment be imposed, defendant must prove that there is a substantial likelihood that a motion for acquittal or a new trial will be granted and, by clear and convincing evidence, that he is not likely to flee or pose a danger to other people or to the community. 18 U.S.C. § 3143(a)(2)(A)(i) & (B). Because the court is denying defendant's motions for acquittal or a new trial in this opinion, the first part of the analysis obviously cannot be satisfied. Nor has defendant presented any clear or convincing evidence that he will not constitute a continuing threat to medical clinics or other abortion providers if released, which dooms his application not only under section 3143(a)(2), but also under the alternative avenue for presentence release described in 18 U.S.C. § 3145(c). See

United States v. Crawford, No. 95-CR-169, slip. op. at 4 (N.D.N.Y. Jan. 4, 1996) (Munson, Sr. J.) ("It is clear that under any method of obtaining presentence release the court must be persuaded by clear and convincing evidence that defendant will pose no threat to any person."). Defendant Arena's request for release pending sentence is thus denied.

2. Disqualification

In his statement defendant Arena renewed his pretrial request that I recuse myself from hearing his case because of an alleged bias. The pretrial motion was untimely within the meaning of 28 U.S.C. § 144 as it was filed less than a week before the first scheduled day of trial, even though the supporting factual allegations were long known to defendant. Notice of Motion, Doc. 60; Letter from John Arena, Dec. 3, 1995, Doc. 59; see United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir.1993) (two month delay untimely). The court nevertheless considered the affidavit and, assuming the truth of the alleged facts, id., found it legally insufficient to support the motion to disqualify.

The court interprets defendant's current complaint as a motion pursuant to Federal Rule of Criminal Procedure 25(b), for post-verdict disqualification. The court is guided in this instance not only by section 144, but by 28 U.S.C. § 455 which particularizes some of the situations that constitute personal bias or prejudice. The two provisions "are construed in pari materia, and the test of legal sufficiency of a motion for recusal is the same under both statutes." United States v. IBM, 857 F.Supp. 1089, 1091 (S.D.N.Y.1994); cf. Liteky v. United States, 510 U.S. 540, ----, 114 S.Ct. 1147, 1156, 127 L.Ed.2d 474 (1994) (extrajudicial source doctrine applicable to recusal under sections 144, 455(a), and 455(b)).

Defendant's first contention is that prejudice or bias arises because my wife has made charitable contributions to Planned Parenthood, a victim in this crime. It is clear that a charitable contribution does not constitute a financial interest in Planned Parenthood as defined by 28 U.S.C. § 455(d)(4) since the donation does not bestow any ownership interest, legal or equitable, in the entity. And revealingly, the statute explains that "[a]n office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' " in that organization. 28 U.S.C. § 455(d)(4)(ii). Thus, relationships with charities far more significant than that of a mere donor are excluded from the disqualifying circumstances in section 455(b). In addition, Planned Parenthood is not a party to this prosecution. In these circumstances, the court does not fathom how its impartiality might reasonably be questioned.

Secondly, defendant argues that this court's denial of pretrial release manifests prejudice towards him. That decision to detain defendant was made at his initial appearance by Judge Pooler. As has been said above in relation to defendant's motion for pretrial release, Magistrate Judge DiBianco held a hearing, then ordered defendant to remain detained pending trial. That order was reconsidered de novo by this court and affirmed, was affirmed by the Second Circuit Court of Appeals, and was denied review by a U.S. Supreme Court justice. Surely any extraordinary irregularity in that decision would have been ferreted out in this appeal process.

Also, defendant's argument would prove too much: if the mere fact of pretrial detention evidenced bias against a defendant, then the granting of bail might constitute a predisposition in his favor. Any pretrial ruling could conceivably be raised as a ground to disqualify a judge from

presiding over the trial of any defendant affected by the ruling. This point is so settled, an author in 1969 was confident enough to state that

> No case, either civil or criminal, has been found in which the courtroom acts or conduct of a federal district judge during trial, or adverse rulings made by him, either in the case or proceeding itself or in related proceedings, have been held to constitute a valid or adequate basis for disqualification....

Burr H. Glenn, Annotation, Disqualification of Federal Judge, Under 28 U.S.C. § 144, For Acts And Conduct Occurring In Courtroom During Trial Or In Ruling Upon Issues Or Questions Involved, 2 A.L.R.Fed. 917, 922 (1969 & Supp.1995) (italics added).[9]

The Second Circuit has said "what the judge has ... done in the proceedings before him[ ] is [not] any basis for disqualification; to be sufficient for disqualification the alleged bias or prejudice must be from an extrajudicial source." King v. United States, 576 F.2d 432, 437 (2d Cir.), cert. denied, 439 U.S. 850, 99 S.Ct. 155, 58 L.Ed.2d 154 (1978); accord In re IBM Corp., 618 F.2d 923, 929 (2d Cir.1980). The denial of pretrial release is clearly a decision in a related prior proceeding in this case; therefore, it is not a cognizable ground for disqualification. See Liteky, 510 U.S. at ----, 114 S.Ct. at 1157.

As a third basis for disqualification, defendant Arena refers to a decision this court rendered some years ago when he, John Arena, and William Tapley, then officials of the Central New York State Right To Life Federation, sought relief against the Syracuse Saint Patrick's Day Parade

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9. Although by the time the 1995 supplement was published, at least two cases had been found. 2 A.L.R.Fed. at supp. §§ 2[a] & 3[a].

Committee. The Committee refused to permit the Federation to enter its float and bus in the parade, and Arena and Tapley sued. The court denied their application for injunctive relief. The court perceives no bias or prejudice that could result to defendant Arena in a jury trial of a Hobbs Act charge from this court's prior refusal to order the Saint Patrick's Day Parade Committee to admit a float sponsored by Central New York Right to Life.

The fact that defendant may have been a losing party to an equitable civil action before this court some years ago is not sufficient grounds for disqualification. In United States v. Ratcliff the defendant argued that the district judge should have recused himself upon the reason that the judge had presided over a prior civil action brought by the defendant. 806 F.2d 1253, 1255 (5th Cir.1986), cert. denied, 481 U.S. 1004, 107 S.Ct. 1625, 95 L.Ed.2d 199 (1987). The Fifth Circuit found no merit to this claim, observing that the alleged bias did not arise from an extrajudicial source. Id. The reported federal cases addressing this issue are in agreement. United States v. Parrilla Bonilla, 626 F.2d 177, 180 (1st Cir.1980) (issuance of injunction followed by conviction for trespass on military base); Barry v. Sigler, 373 F.2d 835, 836 (8th Cir.1967) (civil contempt in bankruptcy proceeding followed by habeas corpus petition from state custody); Wilkes v. United States, 80 F.2d 285, 289 (9th Cir.1935); United States v. Boffa, 513 F.Supp. 505, 511 (D.Del.1981); United States v. Partin, 312 F.Supp. 1355, 1358 (E.D.La.1970).

In sum, this court concludes that a rational person, knowing all the facts, could not reasonably question the impartiality of this tribunal in this matter. United States v. Pitera, 5 F.3d 624, 627 (2d Cir.1993), cert. denied, 510 U.S. 1131, 114 S.Ct. 1103, 127 L.Ed.2d 415 (1994).

3. Ineffective Assistance of Counsel

Although defendant generally praised the performance of his advisory counsel, he lamented that the attorney avoided the issue of the propriety of abortion in arguing the case. The court addresses this as a claim of ineffective assistance of counsel.

The omission described by defendant hardly seems to be a professional error: whether abortion is a legitimate medical practice or a moral perfidy is irrelevant to any element of extortion under the Hobbs Act. The only purpose of repeated references to the evils of abortion would be to appeal to the emotions of the jury, inviting nullification. Refusing to do so is consistent with ethical, professional practice.

Moreover, there is no reasonable probability that prejudice resulted to defendant Arena from his counsel's refusal to make abortion the issue. Such a tactic bears a considerable risk that the jury would be impassioned against the defendant. Even assuming that the jury's personal philosophies on abortion were as split as the American public's, to say that someone disfavors abortion is hardly the same as saying they approve of butyric acid attacks against medical facilities providing abortions. If the lawyer had followed the route defendant now says he would have preferred, it could very easily have done more harm than good.

Whether the decision was good or bad, counsel's conduct in this regard easily falls within "the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Avoiding the contentious abortion issue in defending his client from a Hobbs Act prosecution "was a

strategic choice counsel was entitled to make." United States v. Tarricone, 21 F.3d 474, 476 (2d Cir.1993). Because the supposed failure was most likely sound judgment, and the strategy suggested by defendant might have in fact been detrimental to his case, the assistance of counsel was not ineffectual, and no relief is available upon this basis.

III. CONCLUSION

Defendant Wentworth's motion for judgment of acquittal, or in the alternative, for a new trial is DENIED.

Defendant Arena's motion for judgment of acquittal, or in the alternative, for a new trial is also DENIED. Defendant Arena's motion for release from detention pending sentence is DENIED.

Sentencing for John Arena and Michelle Wentworth is scheduled for June 14, 1996, in Syracuse, New York. The United States Probation Office is directed to prepare presentence investigation reports pursuant to 18 U.S.C. § 3552(a) and Fed.R.Crim.P. 32(c).

It is SO ORDERED.

/s/ Howard Munson
Howard Munson
U.S.S.D.J.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-second day of December, one thousand nine hundred and ninety-nine.

USA

v. Dkt. No: 97-1081

Arena

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants John Arena and Michelle Wentworth.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

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APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 7th day of June, one thousand nine hundred and ninety-nine.

BEFORE: Hon. Amalya L. Kearse
Hon. Chester J. Straub
Circuit Judges
Hon. J. Garvan Murtha
Chief District Judge*

Docket Nos. 97-1081, 97-1082

UNITED STATES OF AMERICA,
Appellee,

-v-

JOHN ARENA and MICHELLE WENTWORTH,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the Northern District of New york and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgments of said district court be and they hereby are affirmed in accordance with the opinion of this court.

FOR THE COURT
Karen Greve Milton, Acting Clerk
By:
/s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

* The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

ISSUED AS MANDATE: 12/29/99

APPENDIX H

New York State Penal Law

§ 105.05. Conspiracy in the fifth degree

A person is guilty of conspiracy in the fifth degree when, with intent that conduct constituting:

1. a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct; or

2. a crime be performed, he being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct.

Conspiracy in the fifth degree is a class A misdemeanor.

§ 145.10. Criminal mischief in the second degree

A person is guilty of criminal mischief in the second degree when with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such right, he damages property of another person in an amount exceeding one thousand five hundred dollars.

Criminal mischief in the second degree is a class D felony.

New York State Environmental Conservation Law

§ 71-2711. Endangering public health, safety or the environment in the fourth degree

A person is guilty of endangering public heath, safety or the environment in the fourth degree when:

1. With criminal negligence, he engages in conduct which causes the release to the environment of a substance acutely hazardous to public health, safety or the environment; or

2. With criminal negligence, he engages in conduct which causes the release to the environment of more than one hundred gallons or one thousand pounds, whichever is less, of an aggregate weight or volume of a substance hazardous to public health, safety or the environment; or

3. He knowingly or recklessly engages in conduct which causes the release to the environment of a substance hazardous to public health, safety or the environment.

Endangering public health, safety or the environment in the fourth degree is a class A misdemeanor.

Note:
This statute appears as it did in 1994-95 at the time Defendant Arena was charged and subsequently entered a guilty plea; since then, in 1998, the phrase "to the environment" was deleted from the middle §§ of subs 1, 2, and 3.